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Supreme Court, U.S.
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No. 03-188

IN THE

Supreme Court of the United States

MARSHA OTTO; F. NAYLOR EMORY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; AND WESLEY S. SEMPLE, ON BEHALF OF THEMSELVES AND ALL OTHER NON-MEMBERS SIMILARLY SITUATED,

Petitioners,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA; NATIONAL EDUCATION ASSOCIATION; AND SHALER AREA EDUCATION ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER LOCAL ASSOCIATIONS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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August 2003

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QUESTIONS PRESENTED

I. Did a majority of the Court in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991), hold that the First Amendment proscribes compelling nonunion public employees to subsidize litigation that does not concern their bargaining unit, thereby requiring the court of appeals to follow that holding?

II. If the answer to question I is "no," is extra-unit litigation a constitutionally chargeable activity under the three-prong test announced in *Lehnert*, 500 U.S. at 519, *i.e.*, that it "must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and 3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop"?

III. Can public school teachers be required to pay the costs of representing public- and private-sector nurses absent factual findings of an "indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization"? *Id.* at 524.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below. Petitioners believe that the party designated by an asterisk has no interest in the outcome of the petition.

> Marsha Otto; F. Naylor Emroy; Dennis A. Erb; Robert K. Gilbert; James W. Lossell; Barbara J. McAlley; Wesley S. Semple; Pennsylvania State Teachers Association; National Education Association; and Shaler Area Education Association.*

In addition to the parties listed above, Grove City Area Education Association ("GCAEA"), a local affiliate of the other defendant unions, was initially a party to the proceedings in the district court. Record ("R.") 1 (Complaint, ¶ 15). GCAEA was voluntarily dismissed from the action upon the filing of the Amended Complaint. R. 19; Appendix ("App.") A at 4a n.2.

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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Petitioners Marsha Otto, F. Naylor Emroy, Dennis A. Erb, Robert K. Gilbert, James W. Lossell, Barbara J. McAlley, and Wesley S. Semple respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on May 8, 2003.

OPINIONS BELOW

The opinion of the court of appeals, App. A, *infra* 1a, is reported at 330 F.3d 125 (3d Cir. 2003). The opinion of the United States District Court for the Middle District of Pennsylvania, App. B, *infra* 28a, is reported at 107 F. Supp. 2d 615 (M.D. Pa. 2000). The report and recommendation of the magistrate judge, App. C, *infra* 51a, is reported at 1999 WL 177093, 161 L.R.R.M. (BNA) 2036 (M.D. Pa. 1999).

JURISDICTION

The court of appeals initially entered judgment on April 3, 2003. Respondents timely sought rehearing. By order dated May 8, 2003, the court denied the petition for rehearing *en banc* but granted the petition for panel rehearing, vacated its earlier opinion and judgment, App. D at 67a, and issued an amended opinion and judgment. App. A at 1a. The time for petitioning for writ of certiorari runs from the later date. Thus, the petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983 (West Supp. 2000), and the Pennsylvania Fair Share Act, 71 Pa. Stat. § 575. Their pertinent texts are set forth in Appendices E at 69a, F at 70a, G at 71a, and H at 72a, respectively.

STATEMENT OF THE CASE

This case presents the question whether the First Amendment permits states to compel nonunion public employees to subsidize the affiliate expenses of their local union for: (1) litigation concerning other bargaining units; and (2) bargaining in other occupations throughout the public- and private-sectors. Respondents Pennsylvania State Education Association ("PSEA") and National Education Association ("NEA") have included such expenses in the agency fees charged Petitioners ("Nonmembers" or "Teachers").

This is a civil rights action under 42 U.S.C. § 1983 for violation of the Teachers' constitutional right not to be compelled to fund union activities not germane to the union's duties as exclusive bargaining representative, as this Court determined in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524, 528 (1991). App. B at 29a. Accordingly, the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

I. The Facts.

Petitioners are seven nonunion public school teachers who are represented for collective bargaining purposes by local teacher unions. Respondents are the state and national affiliates

of the local unions. Although the Teachers are not members of the unions, Pennsylvania law, 71 Pa. Stat. § 575, authorizes the seizure of agency fees from their wages.[1] Thus, Nonmembers are compelled to pay fees to the local and its state (PSEA) and national (NEA) affiliates. App. A at 3a-4a.

The affiliates' fees for the 1994-95 and 1995-96 school years included charges for litigation unrelated to the Teachers' bargaining units ("extra-unit litigation").[2] App. A at 4a.

Some PSEA affiliated locals represent public- and private-sector healthcare professionals, instead of teachers. Thus, PSEA provides representational services to education and healthcare professionals. PSEA does not allocate chargeable costs by profession. Instead, it includes the collective-bargaining expenses incurred for both education and healthcare employees in the fee charged Teachers. App. A at 25a. The "*Hudson* notices"[3] PSEA sent Nonmembers did not explain how the healthcare costs may ultimately inure to the Teachers' benefit by

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[1] Pennsylvania law limits nonmember fees to the amount expended for collective-bargaining purposes. Nonmembers are not required to object in order to avoid seizure of full union dues. 71 Pa. Stat. § 575(a).

[2] A stipulation chose 1994-95 as the test year, limited the litigation to the practices of PSEA and Shaler Area Education Association ("SAEA"), and established a formula through which the result would apply to the NEA. R. at 85; App. B at 31a. Thus, the facts and the discussion herein will not refer further to the NEA.

[3] *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), established the "constitutional requirements for the Union's collection of agency fees," *id.* at 310, including "sufficient information to gauge the propriety of the union's fee." *Id.* at 306. This explanation is often referred to as a "*Hudson* notice."

virtue of their local's affiliation with PSEA. R. 19 (Amended Complaint, Exhibit A).

II. The Proceedings Below.

On July 2, 1996, Marsha Otto and six other teachers filed this suit alleging that the unions: (1) included expenditures in the fee that are constitutionally proscribed under *Lehnert*, 500 U.S. at 524, 528; and (2) did not comply with "the constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S. at 307 & n.18, 310. After the district court confirmed that the Teachers had standing to challenge the unions' fee calculation and the sufficiency of the unions' *Hudson* notice, but not the timeliness of the unions' "arbitration" process, the parties partially settled, dismissing all claims other than the Teachers' claims for declaratory and injunctive relief on three matters. App. A at 4a-5a; App. C at 51a-54a.

The parties then filed a joint stipulation of facts followed by cross-motions for summary judgment on the Teachers' contentions that: (A) *Hudson* requires SAEA's calculation of its agency fee to be verified by an independent auditor ("the notice claim"); and (B) *Lehnert* prohibits PSEA from charging objecting teachers: (1) for extra-unit litigation expenditures; and (2) for expenditures for the representation of healthcare professionals ("the chargeability claims"). App. B at 31a. Only the *Lehnert* chargeability claims involving extra-unit litigation and healthcare representation are relevant to this Petition.

The cross-motions were referred to a magistrate judge who recommended judgment for the Teachers on their first chargeability claim and against them on their second. App. B at 31a-32a. With regard to the first claim, the magistrate found that objecting nonmembers cannot be charged for extra-unit

litigation. He determined that Justice Blackmun in *Lehnert*, 500 U.S. at 528, expressly said extra-unit litigation is nonchargeable, and that "Justice Scalia, concurring in part, reached the same result by application of a different rationale. ('I would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent. [*Id.*] at 550.'[)]." App. C at 63a. Accordingly, the magistrate held that this "issue has been determined by the United States Supreme Court." *Id.* at 64a.

In contrast to the first claim, the magistrate judge found that expenditures for public- and private-sector healthcare workers did not involve "a direct application of a binding precedent." *Id.* Instead, he felt the chargeability of such expenses was a "highly factual question of relatedness as between bargaining activities and the various employee categories." *Id.* at 64a-65a. He then held that the Teachers had the burden of proof on this issue, and that the stipulated record did not provide the necessary facts for them to prevail. *Id.* at 66a. The parties filed objections to the magistrate judge's report and recommendation. App. B at 32a.

The district court overruled all objections and adopted the magistrate judge's report and recommendation in its entirety, entering judgment accordingly. R. 179 (Judgment); App. B at 48a-50a.

As to extra-unit litigation expenditures, although the district court found that the opinions of Justice Blackmun and Justice Scalia each garnered the concurrence of a total of only four Justices, together the opinions "tipp[ed] the scales in [the Teachers'] favor on this issue." App. B at 42a. The significant factors for the district court were this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984) (extra-unit litigation

nonchargeable under the Railway Labor Act ("RLA")), and Justice Scalia's construction in *Lehnert*, 500 U.S. at 555, that *Ellis*' holding on extra-unit litigation "'merely reflect[s] the constitutional rule.'" App. B at 43a.

As to the other chargeability issue, the district court held that the Teachers had the burden of showing that PSEA's representation of healthcare professionals does not meet *Lehnert*'s three-prong test for chargeability. The court ruled that the stipulated evidentiary record did not provide sufficient facts to determine whether such activities meet the *Lehnert* test. "Consequently, those facts do not support the conclusion that the [Teachers'] constitutional rights relating to that claim have been violated." *Id.* at 46a.

The parties cross-appealed, and both chargeability issues were presented to the Third Circuit. The court reversed in part, holding that the costs of both extra-unit litigation and representation of public- and private-sector healthcare professionals are chargeable to the Teachers. App. A. at 5a-6a.

Noting that *Ellis*, 466 U.S. at 453, held that "[t]he expenses of litigation not having such a connection with the [nonmembers'] bargaining unit are not to be charged to objecting employees," the Third Circuit refused to follow *Ellis* because it speculatively doubted that: (1) the litigation expenses in *Ellis* were "incurred by an affiliate bargaining unit pursuant to an expense-pooling arrangement;" and (2) the *Ellis* Court "intended to state a *per se* rule against the chargeability of extra-unit litigation expenses." App. A at 18a-19a.

Next, the Third Circuit agreed that Justice Blackmun's plurality of four held that "dissenting employees may not be charged for the costs of union literature reporting on extra-unit litigation because they cannot be charged for such litigation

itself under *Ellis*." App. A at 20a. But the court held that Justice Scalia, who concurred in part and dissented in part, did not "apply his preferred test to the question whether dissenting employees could be charged . . . (for the expenses of extra-unit litigation itself)." *Id.* at 21a. The court found Justice Scalia's silence "inconclusive."[4] *Id.* at 22a.

Declaring itself free from any "definitive Supreme Court guidance," *id.*, the Third Circuit then applied *Lehnert*'s three-prong chargeability test and decided that extra-unit litigation expenses are chargeable to the Teachers. "Unlike the Justice Blackmun camp in *Lehnert*, we discern no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses." *Id.* at 25a.

Addressing the Teachers' second claim–that there was no showing that the expenses for representing private- and public-sector healthcare professionals could inure to the Teachers' benefit, the Third Circuit agreed that the district court "improperly placed the burden of proof on the [Teachers] when it belonged on the Unions." *Id.* at 26a. Nevertheless, it affirmed on the basis of other reasoning. *Id.* at 27a & n.17. The court found that pooling costs across occupational groups meets

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[4] The Third Circuit recognized that if five justices in *Lehnert* had agreed "that extra-unit litigation is not chargeable to nonunion employees, *Lehnert* would control here." App. A at 21a. Accordingly, the court acknowledged that this decision conflicts with: (1) the Tenth Circuit's holding in *Pilots Against Illegal Dues (PAID) v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1130 n.4 (10th Cir. 1991), that a majority in *Lehnert* would treat extra-unit litigation expenses as nonchargeable; and (2) the Sixth Circuit's finding in *Reese v. City of Columbus*, 71 F.3d 619, 623-24 (6th Cir. 1995), that a majority in *Lehnert* had approved the charging of extra-unit litigation costs because they were pooled expenses. App. A at 22a n.16, 23a, 25a.

Lehnert's general standard for extra-unit activities because "there is 'some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 26a (quoting *Lehnert*, 500 U.S. at 524).

REASONS FOR GRANTING THE WRIT

Each decade this Court has regularly addressed issues concerning the chargeability of union expenses to objecting nonmembers, either under the First Amendment, or to avoid serious doubts as to the constitutionality of a monopoly bargaining statute. *See Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). However, since *Lehnert*, the lower courts are in disarray over the Court's 1991 "definitive" *Lehnert* decision.

"Because of the importance of the issues," *Lehnert*, 500 U.S. at 514, this Court granted certiorari to decide whether objecting nonmembers could constitutionally be compelled to subsidize six types of union activities The Court held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.

Justice Blackmun recognized two exceptions to his conclusion "that a local bargaining representative may charge objecting employees for their pro rata share of the costs associ-

ated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." *Id.* at 524. The two exceptions are that:

> [(1) t]his rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit, ...

id. at 528 (plurality opinion);[5] and

> [(2) t]his conclusion, however, does not serve to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit. . . . There must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.

Id. at 524 (opinion of the Court).

Since *Lehnert*, there has been confusion in the lower courts: (1) whether the Court held that the First Amendment prohibits the use of dissenters' fees for extra-unit litigation, and, thus, binds the courts of appeals,[6] and (2) if not, whether extra-unit litigation satisfies *Lehnert*'s three-prong chargeability test. Additionally, the lower courts have failed to articulate standards

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[5] Justice Scalia, concurring and dissenting in part, explicitly relied on *Ellis*' holding, 466 U.S. at 453, that extra-unit litigation is not chargeable and found the holding "reflect[s] the constitutional rule suggested in *Hanson* and later confirmed in *Abood*." *Lehnert*, 500 U.S. at 555.

[6] There has also been confusion on whether the Court previously had held the same thing in *Ellis*, 466 U.S. at 453.

for always accepting that the expenditure of dissenters' funds for bargaining activities unrelated to their unit "may ultimately inure to the benefit of" that unit. *Id.*

A number of circuits have found it difficult to determine *Lehnert*'s "rule of law" on extra-unit litigation. In *Bromley v. Michigan Education Ass'n*, 82 F.3d 686, 696 (6th Cir. 1996), the Sixth Circuit explained that "[w]hether the objecting employee can be required to contribute to the cost of [extra-unit] litigation proved to be a difficult question for our panel in light of the Supreme Court's fractured decision in *Lehnert*."[7] The Tenth Circuit recognized that because the specific section of Justice Blackmun's opinion in *Lehnert* dealing with extra-unit litigation "was not adopted by a majority of the Court, some uncertainty may remain as to whether the Constitution forbids charging dissenting employees for extra-unit litigation."[8] *PAID*, 938 F.2d at 1130. Judge Silberman of the District of Columbia Circuit complained that he did not understand the basis for the exceptions to the general rule. "[W]hen assessments have been levied for expenditures relating to activities at another bargaining unit, it is impossible to detect in the Supreme Court cases –particularly *Lehnert*–a principled basis for distinguishing expenditures that are 'germane' from those that are not." *Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring dubitante). Consequently, he

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[7] *See also Reese*, 71 F.3d at 623 (*Lehnert*'s application of the chargeability test to specific activities, including extra-unit litigation, is "less than clear").

[8] Nevertheless, the court found that "a majority of the Supreme Court would not allow [the union] to charge these litigation expenses to the [objectors]." *PAID*, 938 F.2d at 1130 n.4.

solicited further guidance from this Court: "[S]urely the Court can give us some principles on which to base our decisions." *Id.*

This confusion and lack of Supreme Court guidance enabled the Third Circuit to depart from the Court's holdings "regarding what the First Amendment will countenance in the realm of union support."[9] *Lehnert*, 500 U.S. at 516.

I. There Is a Conflict Among the Circuits and the State Courts As to Whether a Majority of the Court in *Lehnert* Held That the First Amendment Prohibits the Use of Dissenters' Fees for Extra-Unit Litigation.

The Third Circuit's conclusion that there was no *Lehnert* majority on extra-unit litigation conflicts with decisions of the Tenth Circuit, a substantial minority of the Fourth Circuit, and the Indiana Supreme Court. On the other hand, the Sixth Circuit and the Wisconsin Supreme Court have adopted the Third Circuit's view that *Lehnert* did not provide any binding authority on the issue of extra-unit litigation.[10]

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[9] This Court has repeatedly recognized the significant constitutional interests involved in compelling employees to support a union. "To force employees to contribute, albeit indirectly, to the promotion of [a wide range of social, political, and ideological viewpoints] implicates core First Amendment concerns." *Lehnert*, 500 at 516. "To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222.

[10] The Third Circuit's additional view that *Ellis*, 466 U.S. at 453, does not state a *per se* rule against the chargeability of extra-unit litigation expenses conflicts with decisions of the First and Tenth Circuits, a minority of judges of the Fourth and District of Columbia Circuits, the Wisconsin Supreme Court, and the National Labor Relations

(continued...)

The Tenth Circuit was the first circuit to consider, post-*Lehnert*, whether nonmembers may be compelled to pay for extra-unit litigation. The court noted that its holding that extra-unit litigation costs are not chargeable "is **bolstered** by the recent *Lehnert* decision." *PAID*, 938 F.2d at 1130 (emphasis added). It recognized that the "section of Justice Blackmun's opinion [on extra-unit litigation] was not adopted by a majority of the Court." *Id.* The Tenth Circuit, nonetheless, concluded, based on its reading of Justice Scalia's opinion in *Lehnert*, 500 U.S. at 555, 562 (Scalia, J., concurring in part and dissenting in part), "that a majority of the Supreme Court would not allow [the union] to charge [extra-unit] litigation expenses to the plaintiffs." 938 F.2d at 1130 & n.4.[11]

Extra-unit litigation expenditures also were challenged in *Crawford v. Air Line Pilots Ass'n*, 992 F.2d 1295 (4th Cir. 1993).

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[10](...continued)
Board. *See infra* at 12-15. No other court of appeals or state supreme court has adopted the Third Circuit's view of *Ellis*. Although *Ellis* was a statutory case under the RLA, 45 U.S.C. § 152, Eleventh, like other RLA dues cases, the decision is: (1) "instructive in delineating the bounds of the First Amendment;" (2) provides "some guidance regarding what the First Amendment will countenance in th[is] realm," *Lehnert*, 500 U.S. at 516; and (3) "reflect[s] the constitutional rule," *id.* at 555 (Scalia, J., concurring in part and dissenting in part); *accord Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1516 (10th Cir. 1996).

[11] The Tenth Circuit also relied on *Ellis*, 466 U.S. at 453, in holding that objecting employees cannot be charged for extra-unit litigation. The court expressly rejected the "contention that the Supreme Court did not mean what it said in *Ellis*." *PAID*, 938 F.2d at 1130. "Under *Ellis*, the expenses of any other litigation that does not directly concern [dissenters'] bargaining unit must also be excluded." *Id.* at 1131.

There five judges[12] of the *en banc* Fourth Circuit vigorously dissented from the majority's holding that the issue was not properly preserved for review.[13] Every judge reaching the issue had no doubt that this Court's decisions hold extra-unit litigation expenditures nonchargeable. "In *Ellis* and *Lehnert*, the Supreme Court, in positive, clear-cut terms, declared as bluntly as it could that expenses for litigation outside of a dissenter's unit ('extra-unit litigation'), were not chargeable against the dissenter." 992 F.2d at 1304 (Russell, J., dissenting) (citations omitted); *see also id.* at 1312, 1316.

These five judges rejected the argument that Justice Scalia was silent about extra-unit litigation, and thus there was no binding decision of this Court. Instead, the judges noted that Justice Scalia began his opinion by stating that he "would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent. *Lehnert*, 500 U.S. at 550 (Scalia, J., dissenting)." Then the judges held that "supporting litigation in other units is not a 'duty' that the [statute] required the union here to perform." *Crawford*, 992 F.2d at 1316 (Russell, J., dissenting).[14]

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[12] Judges Russell, Widener, Niemeyer, Hamilton and Luttig. *Crawford*, 992 F.2d at 1303, 1318.

[13] Having found the issue not properly preserved, the panel majority "express[ed] no view about it." *Crawford*, 992 F.2d at 1301.

[14] Extra-unit litigation expenditures have not been considered by the District of Columbia Circuit. Nevertheless, Judge Silberman discussed this Court's holdings on that issue. While seeing inconsistency, he recognized that this Court "has held that non-members cannot be charged . . . for litigation expenses not directly associated with their collective bargaining unit (the latter since the Supreme Court

(continued...)

Similarly, while the Indiana Supreme Court recognized that Justice Scalia's concurring and dissenting opinion did not constitute the opinion of the Court on the extra-unit litigation issue, it did find that Justice Scalia's opinion **and** "the judgment of the Court in *Lehnert*" do "no[t] allow[] nonunion members to be charged for extra-unit litigation." *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App.), ***adopted sub nom. Fort Wayne Educ. Ass'n v. Aldrich***, 594 N.E.2d 781 (Ind. 1992).

The National Labor Relations Board has also accepted that the Court in *Ellis* and *Lehnert* "held [extra-unit litigation] expenses nonchargeable to objectors." *California Saw & Knife Works*, 320 N.L.R.B. 224, 238 (1995).[15] This fact was noticeably omitted from the Third Circuit's discussion of the NLRB's

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[14](...continued)
understands such litigation to be 'political')." *Beckett*, 59 F.3d at 1281, citing *Ellis*, 466 U.S. at 448, and *Lehnert*, 500 U.S. at 507, 519-22, 528, *id.* at 555 (Scalia, J., concurring in the judgment).

Similarly, the First Circuit concluded that *Ellis*, 466 U.S. at 453, "said that the union could not compel payment for litigation expenses not arising out of the contract or not normally conducted by an exclusive bargaining agent, despite the fact that there could be some indirect benefit to union members." *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 299 (1st Cir. 2000).

[15] The Board did not follow these holdings because they "were premised on constitutional considerations," and "precedent grounded in constitutional considerations [are not] binding in the context of the NLRA." *California Saw*, 320 N.L.R.B. at 238.

treatment of extra-unit litigation and the Seventh Circuit's enforcement of the Board's order.[16] App. A at 23a.

The Wisconsin Supreme Court felt Justice Scalia's failure to "directly address" extra-unit litigation meant "there is no majority holding on this issue in *Lehnert*." *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992). Nevertheless, it found that *Ellis* "held that . . . extra-unit litigation expenses . . . failed the first [*Lehnert*] test–neither was sufficiently related to the unions' duties as exclusive bargaining representative to be chargeable." *Id.* at 385. Accordingly, it found extra-unit litigation nonchargeable. "[W]e find Justice Blackmun's plurality opinion persuasive. Moreover, it may be inferred from Justice Scalia's discussion of *Ellis* and from other early [agency fee] cases that a majority of the Court would find extra-unit litigation expenses nonchargeable." *Id.* at 388.

Contrary to these courts, the Third and Sixth Circuits have concluded that there is no binding decision of this Court on extra-unit litigation expenditures **and** have held extra-unit litigation expenses chargeable to objecting nonmembers. The Sixth Circuit concluded that *Lehnert* "did not have a holding on [the extra-unit litigation] issue" because "Justice Marshall correctly observed that the issue of chargeability of [these] costs was not properly before the Court," and "a majority approved of charges for pooled expenses." *Reese*, 71 F.3d at 623-24.

The Sixth Circuit's reliance on Justice Marshall, who dissented on this issue, is suspect. Where the majority has

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[16] In enforcing the Board's order, the Seventh Circuit, without any analysis, cryptically stated that litigation expenditures are "analytically identical, as far as we can see" to all other extra-unit expenditures. *Machinists v. NLRB*, 133 F.3d 1012, 1016 (7th Cir. 1998).

spoken, dissenting opinions are "of course, entitled to no weight as a precedent." *United States v. Harpole*, 263 F.2d 71, 80 (5th Cir. 1959). More important, the court did not discuss either *Ellis*, *Lehnert*'s three-prong chargeability test, or Justice Scalia's *Lehnert* opinion in making its "snap judgment" that there is no holding from this Court concerning the chargeability of extra-unit litigation. Indeed, *Ellis* is cited nowhere in the Sixth Circuit's decision, let alone on this issue to which *Ellis* had specifically spoken.[17]

Similarly, the Third Circuit refused to follow this Court's holdings on extra-unit litigation because it believed that Justice Scalia's opinion was silent on the issue, and thus "his silence is inconclusive." App. A at 22a. Having disclaimed the existence of Justice Scalia's position on this issue, the panel was "left without definitive Supreme Court guidance," *id.*, and thus free to concoct its own result.

There is widespread confusion among the lower courts over Justice Scalia's – **and, thus, the Court's** – position on extra-unit litigation. That there is such confusion is mystifying because this Court has provided the lower courts guidance in following

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[17] Earlier, a Sixth Circuit panel (including two judges from the *Reese* panel) declined to resolve whether Justice Scalia's concurrence/dissent, which was joined by three other Justices, implicitly joined Justice Blackmun's plurality or Justice Marshall's dissent. Nevertheless, this panel concluded that Justice Scalia did not reach the extra-unit litigation issue, and, thus, "*Lehnert* did not *clearly* hold extra-unit . . . litigation nonchargeable." *Jibson v. Michigan Educ. Ass'n-NEA*, 30 F.3d 723, 732 (6th Cir. 1994) (emphasis in original). That panel, too, inexplicably ignored *Ellis*.

and applying fragmented decisions.[18] Nevertheless, as demonstrated above, the confusion exists, and this Court should exercise its supervisory power to resolve that confusion.

A. Justice Scalia Concurred in the *Lehnert* Judgment That Reversed the Chargeability of Extra-Unit Litigation.

It is clear that Justice Scalia, joined by Justices O'Connor and Souter,[19] concurred in the *Lehnert* judgment reversing the Sixth Circuit's holding that extra-unit litigation costs are chargeable to objecting nonmembers. **First**, Justice Scalia's "statutory duties" test presents narrower grounds for chargeability than Justice Blackmun's three-prong analysis. *Lehnert*, 500 U.S. at 558 (Scalia, concurring in part, dissenting in part). For instance, under the three-prong analysis, miscellaneous professional activities, *id.* at 529; local delegate expenses to attend conventions of the local's state and national affiliates, *id.* at 529-30; and threats of or preparation for illegal strikes are chargeable, *id.* at 530-31. However, under Justice Scalia's "statutory duties" test these activities are not chargeable. *Id.* at

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[18] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal citation omitted).

[19] Although Justice Kennedy joined Justice Scalia's opinion, 500 U.S. at 550-62, Justice Kennedy wrote separately, *id.* at 562-64, to make clear that he did not agree with Justice Blackmun's removal of litigation from the scope of the Court's holding that the "otherwise chargeable" extra-unit expenses of affiliate unions may be charged nonmembers. *Id.* at 563-64. This provides additional evidence that Justice Scalia agreed with Justice Blackmun on this issue.

559-60, 562. It is only logical to assume that Justice Scalia's silence as to other activities discussed by Justice Blackmun means Justice Scalia concurred in Justice Blackmun's judgment, not dissented, as to those activities. This conclusion is further supported by the fact that Justice Scalia dissented only from Justice Blackmun's chargeability findings, not his **non**chargeability determinations.

Second, Justice Scalia explicitly relied on *Ellis*' holding on extra-unit litigation to support his "statutory duties" test:

> [E]xpenses for litigation "seeking to protect the rights of airline employees generally" could not be charged, but only those for litigation "incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit," and "other litigation . . . that concerns bargaining unit employees and is normally conducted by the exclusive representative."

Lehnert, 500 U.S. at 555 (quoting *Ellis*, 466 U.S. at 453) (Scalia, concurring in part, dissenting in part). Justice Scalia then treated *Ellis* "as merely reflecting the constitutional rule suggested in *Hanson* and later confirmed in *Abood*." 500 U.S. at 555. The Wisconsin Supreme Court found that these facts demonstrated that "a majority of the Court would find extra-unit litigation expenses nonchargeable." *Browne*, 485 N.W.2d at 388.

Justice Marshall, dissenting from *Lehnert*'s holding on extra-unit litigation,[20] also disagreed with Justice Scalia's reliance

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[20] "I also disagree with **the Court's decision** that the costs of articles . . . about union litigation outside petitioners' bargaining unit are not chargeable." *Lehnert*, 500 U.S. at 534 (Marshall, J., dissenting)

(continued...)

on *Ellis* and its statement of the constitutional rule. *Ellis*, "in my view, is not controlling here. . . . [N]othing in the [*Ellis*] Court's discussion of extra-unit litigation . . . suggests a constitutional rather than statutory basis for excluding these particular costs." *Lehnert*, 500 U.S. at 548-49 (Marshall, J., dissenting). Justice Marshall clearly recognized that Justice Scalia's reliance on *Ellis* and treatment of *Ellis* as stating the constitutional rule, meant that Justice Scalia's opinion opposed Justice Marshall's view that extra-unit litigation costs are chargeable. *See Albro*, 585 N.E.2d at 673 ("Justice Scalia's concurring and dissenting opinion . . . [does] no[t] allow[] nonunion members to be charged for extra-unit litigation."). Otherwise, Justice Marshall would have written the opinion of the Court on this issue and not dissented.

Third, Justice Scalia stated that the first prong of Justice Blackmun's chargeability test–expenses must be germane to collective-bargaining activity–"could, if properly elaborated, stand for" his "statutory duties" test. However, he found that "the manner in which the Court applies it to the expenditures before us here demonstrates that the Court" applied it too broadly and allowed chargeable expenditures that are not chargeable under his "statutory duties" test. *Lehnert*, 500 U.S. at 557. He never complained that Justice Blackmun found something nonchargeable that should have been chargeable. "I readily conclude that a number of the challenged expenses

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[20](...continued)
(emphasis added). "I respectfully dissent from **the Court's conclusion** that the three types of charges discussed above [lobbying, public relations and extra-unit litigation] may not be included in the service fees." *Id.* at 550 (emphasis added).

cannot be charged to the nonmembers." *Id.* at 558 (emphasis added).

Justice Blackmun found extra-unit litigation to be nonchargeable precisely because it is "not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, . . . we hold that the Amendment proscribes such assessments in the public sector." *Id.* at 528. It would indeed be perverse to believe that Justice Scalia's "silence" means that he did not support Justice Blackmun's finding that extra-unit litigation is not germane and its nonchargeability is required by the Court's previous holding in *Ellis*.[21]

That Justice Scalia does not mention extra-unit litigation in his list of chargeable extra-unit services that affiliated organizations may provide, *Lehnert*, 500 U.S. at 561, further shows that Justice Scalia concurred in Justice Blackmun's conclusion that the unanimous rationale that supports the chargeability of most "otherwise chargeable" extra-unit activities "does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit." *Id.* at 528.

Fourth, Justice Scalia distinguished between collective-bargaining services provided by affiliated organizations that may improve the outcome of negotiations, for which he would permit the union to charge, and those that "do so through some means other than the bargaining process," for which he would

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[21] Both the Indiana and Wisconsin Supreme Courts concluded that extra-unit litigation fails the first aspect of the *Lehnert* test because "it is not germane to the collective bargaining activity of the local union." *Browne*, 485 N.W.2d at 388; *accord Albro*, 585 N.E.2d at 673.

not. *Id.* at 561 n.4; *see also id.* at 559 (public relations and lobbying, "though they may certainly affect the outcome of negotiations, are not part of this collective-bargaining process"). Clearly, extra-unit litigation by definition is outside the bargaining process in the dissenter's bargaining unit.[22]

As noted earlier, there is widespread confusion among the lower courts over Justice Scalia's–**and, thus, the Court's**–position on extra-unit litigation. Thus, the location of one's employment now determines whether extra-unit litigation expenses are chargeable to nonmembers, not the uniform decision of this Court. In the other circuits, uncertainty and confusion are likely to continue as those circuits are forced to parse Justice Scalia's position on extra-unit litigation. An individual's First Amendment rights should never depend on geography or uncertainty twelve years after a supposedly definitive ruling of this Court. Therefore, this Court should exercise its supervisory power by granting a writ of certiorari on this issue and ending the confusion and uncertainty.

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[22] The Third Circuit rejected the Teachers' interpretation of Justice Scalia's opinion as inconclusive, App. A at 22a, but then speculated that Justice Scalia's chargeability standard might be applied in such a way as to find "a local bargaining unit's *pro rata* share of pooled litigation expenses" chargeable. *Id.* at 22a n.16. However, Justice Scalia always limited his support of the chargeability of extra-unit activities to the affiliates' "on-call services for use **in the bargaining process.**" *Lehnert*, 500 U.S. at 561 (emphasis added).

II. The Third Circuit's Decision That Unions Constitutionally May Compel Objecting Nonmembers to Pay for Extra-Unit Litigation Fails *Lehnert*'s Three-Prong Chargeability Test.

Assuming *arguendo* that there is no majority holding in *Lehnert* on extra-unit litigation expenditures, the Third Circuit's application of *Lehnert*'s three-prong chargeability test conflicts with relevant decisions of this Court. Its result also conflicts with numerous lower courts.[23] The Third Circuit found extra-unit litigation chargeable because it treated a different test, the "enure to the benefit" test, 500 U.S. at 524, as the equivalent to the three-prong chargeability test, *id.* at 519. App. A at 24a-25a. It thus decided this important federal question in a way that conflicts with the relevant decision of this Court in *Ellis* and *Lehnert*.

The Third Circuit found extra-unit litigation costs meet the first prong, germane to collective bargaining, "[b]ecause the extra-unit litigation expenditures at issue ensure the availability

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[23] To be fair, as shown in Section I, *supra*, the other lower courts found themselves bound by the Court's *Ellis* and/or *Lehnert* holdings on the nonchargeability of extra-unit litigation. Although they mentioned the three-prong test, they did not apply it in a vacuum. Only the Third Circuit found itself "left without definitive Supreme Court guidance," App. A at 22a, and applied the three-prong test as it saw fit. On the other hand, the Sixth Circuit, the only other circuit to uphold the chargeability of extra-unit litigation, erroneously found that a majority of the Court approved of charging for pooled litigation expenses. *Reese*, 71 F.3d at 626. Although the Third Circuit correctly found that "*Reese* overstates *Lehnert*'s holding, as the *Lehnert* majority never held extra-unit litigation expenses incurred pursuant to a pooling agreement to be chargeable," it "nonetheless agree[d] with the Sixth Circuit's conclusion." App. A at 23a.

of resources for collective-bargaining-related litigation." App. A at 24a. However, like lobbying and public relations activities, which Justice Scalia specifically agreed with Justice Blackmun are not chargeable (although each used a different chargeability test), *Lehnert*, 500 U.S. at 558-59, extra-unit litigation is "no[t] part of this collective-bargaining process," *id.* at 559 (Scalia, J.), even though "precedent established through litigation on behalf of one unit may ultimately be of some use to another unit," *id.* at 528 (Blackmun, J.).

Applying the second prong of the *Lehnert* test, the Third Circuit simply noted "that the free-rider concerns applicable to other pooled-expense arrangements apply with-equal force to extra-unit litigation expenditures," but offered no other justification. App. A at 24a. Because the Third Circuit ignored the political and expressive nature of litigation, it erroneously failed to find that litigation fails the second prong, as lobbying and other political activities do.

The governmental interests underlying this Court's acceptance of forced-unionism schemes are "promoting labor peace and avoiding the 'free-rider' problem that would otherwise accompany union recognition." *Lehnert*, 500 U.S. at 520-21. Neither goal is served by charging objecting employees for lobbying, electoral, and other political activities, including extra-unit litigation, which do not relate to their collective-bargaining agreement. Labor peace is not served because, "unlike collective-bargaining negotiations between union and management," the courts, like legislatures, the media, and other platforms of public discourse, "are public fora open to all." *Id.* at 521. Moreover, the "free-rider" concern is inapplicable where litigation, like lobbying, "extends beyond the effectuation of a collective-bargaining agreement." *Id.*

The Third Circuit found that extra-unit litigation expenses pass *Lehnert*'s third prong, because "pooled litigation resources are expended on collective-bargaining-related activities," and thus meet the "may ultimately inure to the benefit" test imposed by the Court for extra-unit activities. App. A at 25a. However, the third prong (not adding to the burden of free speech) and the "may ultimately inure to the benefit" test are not interchangeable.

Justice Blackmun recognized that just because something may pass the "inure to the benefit" test does not mean that it will pass the Court's three-prong chargeability test. He conceded that extra-unit litigation may ultimately inure to the benefit of the bargaining unit, *Lehnert*, 500 U.S. at 528. Nonetheless, he still found it nonchargeable, because it is speech and association that is both political and public in nature. *Id.*

Moreover, the third prong applies to communicative content outside of the union, while nonideological conduct within the union or between the union and the employer are analyzed under the more lenient "may ultimately inure to the benefit" test. See *Crawford*, 992 F.3d at 1314-15, 1317 (Russell, J., dissenting). Litigation, which by definition is outside the union and involves third parties in addition to the union and the employer, can never be analyzed under the "inure to the benefit" standard, but must always be analyzed under the three-prong test.

Forced funding of political and ideological speech outside the union-employer context or the collective-bargaining process is an additional burden to free speech beyond that inherent in the allowance of the agency shop. *Lehnert*, 500 U.S. at 521-22,

524.[24] However, the court refused to recognize that all litigation has an "important political and expressive nature" and is "more akin to lobbying in both kind and effect." *Id.* at 528, citing *NAACP v. Button*, 371 U.S. 415, 431 (1963).[25] "[T]he Supreme Court ha[s] been particularly chary of treating as germane union expenditures that touch the political world." *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422 (D.C. Cir. 1997) (citing *Lehnert* and *Ellis*), *aff'd*, 523 U.S. 866 (1998). Therefore, extra-unit litigation is a continuation of the political process, not the collective-bargaining process. *See Beckett*, 59 F.3d at 1281 (Silberman, J., concurring).

The Third Circuit's application of these tests to determine whether the First Amendment allows the state to compel payment for extra-unit litigation conflicts with the definitive decisions of this Court. Thus, this Court should grant certiorari to decide whether the Third Circuit properly applied *Lehnert*'s three-prong chargeability test to extra-unit litigation.

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[24] [A]llowing the use of dissenters' assessments for political activities outside the scope of the collective-bargaining context would present 'additional interference with the First Amendment interests of objecting employees.' *Ellis*, 466 U.S. at 456. . . . The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context.

Lehnert, 500 U.S. at 521, 522. "[W]e find extraunit litigation to be more akin to lobbying in both kind and effect. We long have recognized the important political and expressive nature of litigation." *Id.* at 528.

[25] "As Justice Blackmun recognized, an association for litigation often constitutes the most effective form of political association." *PAID*, 938 F.2d at 1131.

III. The Third Circuit's Decision That Affiliated Unions May, As a Matter of Law, Charge Nonmembers for Their Pooled Costs Across Occupational Groups Conflicts with Decisions of Other Courts of Appeals and State Supreme Courts.

The Third Circuit correctly found that "the District Court improperly placed the burden of proof on the plaintiffs when it belonged on the Unions. As *Lehnert* points out, '[t]he union [bore] the burden of proving the proportion of chargeable expenses to total expenses.'" App. A at 26a (quoting *Lehnert*, 500 U.S. at 519). The Third Circuit admitted that the unions neither met their burden of proof nor provided any evidence "that the payment [for the representation of healthcare professionals] is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." 500 U.S. at 524. Yet, it refused to reverse the district court and remand for entry of judgment for the Teachers.[26] Instead, the Third Circuit held, as a matter of law, that unions "may pool costs across occupational groups." App. A at 26a. That ruling ignores this Court's strict admonition in *Lehnert* that chargeability determinations require "a case-by-case analysis." 500 U.S. at 519.

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[26]The case was decided on cross-motions for summary judgment based on a stipulated record and request for "expeditious judicial resolution" "pursuant to the stipulated facts." App. B at 48a. Accordingly, there is no basis for a remand for further evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed. R. Civ. P. 39(a). If the party that has the burden of proof does not satisfy that burden on the stipulated record, then summary judgment is appropriate for the other party. 477 U.S. at 323; *see also* App. B at 47a.

When faced with a record inadequate to determine whether challenged activity "inured to the benefit of the members of the local union," *id.* at 524, the District of Columbia and Tenth Circuits, unlike the Third Circuit, reversed summary judgments in favor of the unions. In *Beckett*, 59 F.3d at 1279-80, the District of Columbia Circuit reversed a holding that a sympathy strike at another airline carrier inured to the benefit of the dissenters because the record did not reveal whether the "union's participation therein [was] intended merely to express solidarity with the primary striking union rather than to advance its own collective bargaining objectives." *Id.*

The Tenth Circuit in *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1517 (10th Cir. 1996), described the issue as whether "the Eastern strike assessment was designed to advance, and was reasonably likely to advance ALPA's own collective bargaining objectives at United." The court found the union's supporting evidence to be "simply too tenuous." "We read *Lehnert* as requiring more than the speculative nexus ALPA asserts." *Id.* at 1518. Accordingly, it reversed the judgment because the union's evidence was "inadequate" to support its burden, and remanded for entry of summary judgment for the objector on his statutory and constitutional claims. *Id.* at 1519.[27]

Two state supreme courts have also recognized that there must be supporting evidence and a finding that extra-unit costs may benefit the nonmembers' local unions. *Albro*, 585 N.E.2d

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[27] The Tenth Circuit also has held that a district court must "hold a hearing to determine which fees are attributable to bargaining-related expenses in the unit as distinguished from those which do not inure to the benefit of the local bargaining unit." *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1196 (10th Cir. 2002).

at 674; *Browne*, 485 N.W.2d at 387-88. *Albro* specifically found that *Lehnert*'s "inure to the benefit" language does not allow "*all* affiliation expenses [to be] chargeable." 585 N.E.2d at 674 (emphasis in original).

In fact, most courts of appeals that have allowed extra-unit expenses to be charged to nonmembers have done so because the district court or labor board made specific, detailed and exhaustive factual findings as to the beneficial relationship between the dissenters' bargaining unit and the extra-unit expenses. *Finerty v. NLRB*, 113 F.3d 1288, 1289, 1291-92 (D.C. Cir. 1997); *Crawford*, 992 F.2d at 1300, 1302-03; *PAID*, 938 F.2d at 1128.

In *Crawford*, Judge Wilkinson noted the lack of any rule-of-law holding in this area and observed: "In cases involving other industries [than the airline industry] and other unions, . . . such a factual including may not be present. In such circumstances, of course, application of *Lehnert* may very well result in a different outcome." 992 F.3d at 1303 n.1 (Wilkinson, J., concurring). Here, the Third Circuit upheld the chargeability of these extra-unit costs, as a matter of law, absent any evidence or factual findings. App. A at 25a-27a. It is the only court to do so.

Therefore, this Court should grant certiorari to review the Third Circuit's imposition of a general legal rule absent any factual findings that the union has met its burden of proof to show the beneficial relationship of the extra-unit representation of healthcare professionals to the Teachers' bargaining unit.

IV. The Third Circuit's Decision That Pooling Costs Across Occupational Groups May Ultimately Inure to the Benefit of All of the Occupational Groups Conflicts with *Lehnert*'s Rule That "Bargaining Activities Wholly Unrelated to the Employees in Their Unit" Are Not Chargeable to Them.

The Third Circuit's holding, App. A at 26a-27a, that extra-unit expenses of affiliated unions may be chargeable to non-members without the union "demonstrat[ing] a direct and tangible impact upon the dissenting employee's unit," *Lehnert*, 500 U.S. at 524, erroneously establishes a general rule that swallows *Lehnert*'s exception. *Lehnert* held that the general rule as to extra-unit bargaining does not "grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit." *Id.* at 524; *cf. Miller*, 108 F.3d at 1423 (refusing to extend the *Lehnert* exception that lobbying is chargeable in the limited context of contract ratification or implementation for public- sector unions because to do so would swallow the general rule of the nonchargeability of lobbying).

While this Court did not require proof of "a direct and tangible impact upon the dissenting employee's unit" for the chargeability of affiliated unions' extra-unit expenses, it, unlike the Third Circuit, did require "some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Lehnert*, 500 U.S. at 524.

Ironically, this Court intended these comments to limit the chargeability of extra-unit expenses, not, as the Third Circuit and other courts interpret it, to expand immensely the chargeability of **all** extra-unit expenses. In addition to the Third Circuit's forcing Teachers to pay for the costs of the unions'

representation of healthcare professionals (across occupational groups), other courts have compelled subsidization of the costs of representing workers in: (1) other countries (Canada), *Machinists*, 133 F.3d at 1016; *Finerty*, 113 F.3d at 1289; and (2) other industries, *Finerty*, 113 F.3d at 1289. As we have shown, the Third Circuit's *per se* standard for the chargeability of all extra-unit expenses, including extra-unit litigation, is belied by the facts that: (1) *Lehnert* did not apply its extra-unit standard to all extra-unit expenses before it; and (2) the Third Circuit's holding does fundamentally alter the "germaneness" standard that the Court has used in all of its cases on these issues and that *Lehnert* explicitly adopted. *See also Crawford*, 992 F.2d at 1305-06, 1317-18 (Russell, J., dissenting).

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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August 6, 2003

APPENDIX A

OPINION
OF THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

MAY 8, 2003

[330 F.3d 125]

Marsha OTTO; F. Naylor Emery; Dennis A. Erb;
Robert K. Gilbert; James W.
Lossell; Barbara J. McAlley; Wesley S. Semple,
On behalf of themselves and all
other non-members similarly situated

v.

PENNSYLVANIA STATE EDUCATION
ASSOCIATION-NEA;
National Education Association;
Shaler Area Education Association, On behalf of
themselves and all other local associations
similarly situated Appellants

Marsha Otto; F. Naylor Emery; Dennis A. Erb;
Robert K. Gilbert; James W. Lossell;
Barbara J. McAlley; Wesley S. Semple,
On behalf of themselves and all
other non-members similarly situated Appellants

v.

Pennsylvania State Education
Association-NEA; Shaler Area Education
Association, On behalf of themselves and all
other local associations similarly situated,
National Education Association; Grove City Area
Education Association; Jane Campbell;
Barbara Leiby

Nos. 01-3858, 01-4110.

United States Court of Appeals, Third Circuit.

Argued June 27, 2002.
Filed: May 8, 2003.

* * * *

[128]Before: AMBRO and STAPLETON, Circuit Judges, and O'NEILL,* District Judge.

OPINION OF THE COURT

AMBRO, Circuit Judge.

We consider whether, under the First Amendment, certain expenses incurred by unions may be charged to non-members and whether a local union must obtain independent auditor verification of its charges (and, if so, what kind of verification we require).

The First Amendment affords public-sector employees the freedom not to associate with a labor organization. *See Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 301, 106 S.Ct. 1066, 89 Ed.2d 232 (1986) (quoting *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261(1977)). There are limits to this constitutional freedom, however, in light of organized labor's important role in advancing employment conditions. *Abood,* 431 U.S. at 225-26, 97 S.Ct. 1782. Thus, as a means of curing the so-called "free-rider" problem posed by its representation of non-members, a union may charge each non-member employee a fair-share, or agency, fee equal to his or her *per capita* share of the union's expenses arising from its duties as a collective-bargaining representative. *See id.* at 235-36, 97 S.Ct. 1782. But a union may not, consistent with the First Amendment, collect fair-share dues to

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* Honorable Thomas N. O'Neill, Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

support ideological causes or other expenses insufficiently related to collective bargaining. *Id.*

To ensure that non-members are assessed only for fair-share fees properly chargeable to them, the Supreme Court has ruled that unions must adopt procedural safeguards "carefully tailored to minimize the [First Amendment] infringement." *Hudson,* 475 U.S. at 303, 106 S.Ct. 1066. First, the union must provide a non- member with "sufficient information to gauge the propriety of the union's fee." *Id.* at 306, 106 S.Ct. 1066. This explanation of the basis for the fee is often referred to as a "*Hudson* notice." Second, a non-member must have an adequate opportunity to object to the fair-share fee allocation. *See id.* at 307, 106 S.Ct. 1066. The two safeguards are linked; without the *Hudson* notice, a non-member would lack a basis for deciding whether to object to a fair-share fee calculation. *Penrod v. NLRB,* 203 F.3d 41, 46 (D.C.Cir.2000).

When theory meets practice, questions abound. Do the financial information requirements apply to small local unions? How much verification of that information must there be? When a union represents more than one bargaining unit, can that union include, in the fair-share fee assessed to non-members of one bargaining unit, costs associated with another bargaining unit's litigation? What if those bargaining units are in different industries?

I. BACKGROUND AND PROCEDURAL HISTORY

Shaler Area Education Association ("SAEA") is the exclusive bargaining representative for education professionals employed by the Shaler Area School District. SAEA is the local affiliate of the Pennsyl-[129]vania State Education Association

("PSEA")–which represents, *inter alia,* both education and healthcare professionals in the Commonwealth–and the National Education Association ("NEA," and collectively with SAEA and PSEA, the "Unions"). During the 1994-1995 school year, the Shaler Area School District employed 355 education professionals, 344 of whom were members of the SAEA (and, thereby, the PSEA and NEA). Because all three Unions provide collective-bargaining services to the plaintiffs' bargaining unit, the eleven non-members paid fair- share fees to the SAEA, PSEA, and NEA pursuant to 71 Pa. Cons.Stat. Ann. § 575 (West 2003).

Seven non-union education professionals brought this 42 U.S.C. § 1983[1] action to challenge the Unions' fair-share fee procedure and assessments.[2] After the District Court confirmed that the plaintiffs had standing to object to the fair-share fees

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[1] 42 U.S.C. § 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[2] Six of the named plaintiffs are members of the SAEA-represented bargaining unit. The seventh, Marsha Otto, is a member of the bargaining unit represented by the Grove City Area Education Association ("GCAEA"). While GCAEA was a defendant in the original complaint, it was dismissed from the action in plaintiffs' amended complaint.

and the sufficiency of the Unions' *Hudson* notice,[3] the parties filed a joint stipulation of facts followed by cross-motions for summary judgment. The District Court granted partial summary judgment in favor of the plaintiffs, declaring that the SAEA must verify its expenditures through an independent audit and that PSEA[4] could not charge the plaintiffs for expenses incurred in litigation not relating specifically to the plaintiffs' own collective-bargaining unit. However, it also held that the Unions could assess education-professional plaintiffs for non-litigation expenditures related to the Unions' representation of healthcare professionals.

Both parties appealed, and together they present four issues for our review: (1) whether, by filing their complaint, plaintiffs objected properly to the Unions' fees and procedures; (2) whether a local union, regardless of size, must obtain an independent auditor verification of the expenditures listed in its fair-share calculation notice (and, if so, we need to decide at what level of auditor inquiry); (3) whether a union may charge non-members for collective- bargaining-related litigation costs incurred on behalf of another bargaining unit pursuant to an expense-pooling arrangement with that other bargaining unit; and (4) whether a union may charge non-members for pooled resources available to all local affiliates even though some of the affiliates represent employees in different professions. We rule in favor of plaintiffs as to issues one and two (and determine the

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[3] However, the District Court held that, because the plaintiffs did not use the Unions' arbitration process, they lacked standing to challenge the timeliness of that process. *Otto v. Pa. State Educ. Ass'n- NEA*, 950 F.Supp. 649, 651-52 (M.D.Pa.1997).

[4] The District Court's order refers to PSEA and NEA, though it appears that the Unions argue in their briefing only as to PSEA.

level of verification required) and the Unions on issues three and four.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We exer-[130]cise appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Whether plaintiffs properly objected to the Unions' fair-share fee calculation is a question of standing and is subject to *de novo* review. *In re RFE Indus., Inc.*, 283 F.3d 159, 163 (3d Cir.2002). We also review *de novo* the District Court's grant of summary judgment. *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 210 (3d Cir.2002).

III. DISCUSSION

A. Objection Requirement

The Unions contend that plaintiffs failed to carry their burden of objecting to the fair-share fee calculation by not raising a "contemporaneous objection," *i.e.*, by not objecting at the time of fee collection. Addressing this issue as a question of plaintiffs' standing to sue, the District Court rejected the Unions' contention on the ground that plaintiffs' complaint satisfied the objection requirement. We agree.

No Supreme Court case explicitly establishes a contemporaneous-objection requirement. While *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141(1961), held that each non-member must *individually* object to disputed fair-share fees, that requirement

merely places the burden on dissenting employees affirmatively to opt out of fees to which they object, rather than allowing them to opt into fees with which they agree. *See id.* at 771, 81 S.Ct. 1784 (holding that because the individual *Street* plaintiffs "have in the course of [this action] made known to their respective unions their objection to the use of their money for the support of political causes[,] . . . the respective unions were without power to use payments thereafter tendered by them for such political causes"). Since *Street*, the Court has reiterated that non-members may raise their initial objection in a complaint. *Abood*, 431 U.S. at 239, 97 S.Ct. 1782 ("[T]he requirement in *Street* that dissent be affirmatively indicated was satisfied by the allegations in the complaint that was filed.") (citation omitted); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Exps. & Station Employees v. Allen*, 373 U.S. 113, 119 n. 6, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963) (citing *Street*, 367 U.S. at 771, 81 S.Ct. 1784) (employees in Railway Labor Act case "first made known their objection to the [unions'] political expenditures in their complaint filed in this action; however, this was early enough").

Yet the Unions argue that *Hudson* imposed a more onerous notice standard and that "post-*Hudson* cases have implicitly rejected the notion of objection-by-lawsuit." Even assuming *arguendo* that the Unions are correct, the contemporaneous-objection principle they espouse would nonetheless be inapplicable in this case because, as we explain more fully *infra* in Section III. B, "the notice procedures and the fee information given under the plan were inadequate." *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430 (6th Cir.1990). Thus the plaintiffs lacked sufficient information to formulate a contemporaneous objection.

B. Independent Auditor Verification

In *Hudson,* the Supreme Court held that a local union representing 27,500 employees and collecting over $4 million in annual dues must provide non-members with "sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306, 106 S.Ct. 1066. The Court went on to explain that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, ***as well as verification by an independent auditor.***" **[131]***Id.* at 307 n. 18, 106 S.Ct. 1066 (emphasis added). We applied *Hudson*'s independent auditor requirement in *Hohe v. Casey,* 956 F.2d 399 (3d Cir.1992), and held that the First Amendment required a state-level exclusive bargaining representative for approximately 54,000 employees to obtain independent auditor verification. *Id.* at 415-16. We noted that "the purpose of requiring the verification in the [*Hudson*] notice is to give the nonmembers some prior assurance that the [fair-share] fee was properly calculated," and "[w]hen nonmembers do not receive that assurance, their constitutional rights are violated under *Hudson.*" *Id.* at 415.

Today we decide whether *Hudson*'s independent auditor requirement applies to SAEA, a much smaller union than the unions involved in *Hudson* and *Hohe.* Plaintiffs argue that it does. The Unions contend that *Hudson*'s independent auditor requirement was merely *dictum* or applies only to large unions, like those in *Hudson* and *Hohe,* that can afford an independent auditor. They point out that SAEA would spend more on an audit than it collects through fair-share fees. Moreover, the Unions claim that SAEA's finances are so simplistic that non-

members can obtain "sufficient information," *Hudson,* 475 U.S. at 306, 106 S.Ct. 1066, by examining its documents themselves.

The Ninth Circuit has addressed this issue. In *Prescott v. County of El Dorado,* 177 F.3d 1102 (9th Cir.1999), *vacated on other grounds,* 528 U.S. 1111 (2000), 120 S.Ct. 929, 145 L.Ed.2d 807, *reinstated in relevant part,* 204 F.3d 984 (2000), the Court held that, regardless of its accompanying high cost, a state union must conduct a "true audit." *Id.* at 1107-08. However, the Court left unanswered whether the independent auditor requirement applied to a small local union. *Id*. at 1108. ("We do not decide that each little unit in the [state union] firmament must necessarily be subjected to a separate verified audit of its expenditures . . . ."). In a subsequent case very recently decided, *Harik v. California Teachers Association,* 326 F.3d 1042 (9th Cir. 2003),[5] the Court provided an answer: an independent auditor verification is not necessary. The *Harik* Court interpreted *Hudson* to require, in the context of a local union with under $50,000 in estimated annual revenues, "*either* [disclosure of] the full financial material necessary to verify [a union's expenditures], *or* an independently sanctioned verification of [ ] the local union's chargeable and non-chargeable expenditures." *Id*. at 1049 (emphasis added). Thus, a small local union need only provide sufficient information so that a "nonmember can independently verify that the union spent its

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[5] The Ninth Circuit initially decided *Harik* on August 1, 2002, but withdrew its opinion and substituted a revised opinion on April 15, 2003. The earlier opinion held that a small local union must obtain "independent verification" of its expenses, but need not obtain a "formal audit." *Harik v. Cal. Teachers Ass'n,* 298 F.3d 863, 866 (9th Cir.2002). The Court did not discuss precisely what "independent verification" entails and how it differs from the "true audit" *Prescott* required of larger unions.

money where it claimed that it did." *Id.* In so doing, the Ninth Circuit shifted the burden of expense verification from the union to the nonmember. It reasoned that "[f]or the smallest affiliates, providing financial reports along with full and fair access to bills, check stubs, canceled checks, account balances, and related materials may be more cost-efficient than an external review." *Id.*[6]

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[6] Additionally, a state case from Massachusetts, *Wareham Education Association v. Labor Relations Commission,* 430 Mass. 81, 713 N.E.2d 363 (1999), squarely addressed the question before us and held that "there is no exception to *Hudson*'s audit requirement for small local union affiliates." *Id.* at 368. Another state-court case, *Whitley County Teachers Association v. Bauer,* 718 N.E.2d 1181 (Ind.Ct.App.1999), reached the opposite result, holding that *Hudson* was not violated when a local union did not obtain an independent audit of its financial records. *Id.* at 1191-92. In *Tierney v. City of Toledo,* 824 F.2d 1497 (6th Cir.1987), the Sixth Circuit wrote that *Hudson* required "an audited, detailed accounting of local union payments to affiliated state and national labor organizations." *Id.* at 1503. However, the Court did not make this statement in the context of a claim that *Hudson*'s requirements should apply differently to a small local union, as is the case here.

In *Andrews v. Education Association of Cheshire,* 829 F.2d 335 (2d Cir.1987), the Second Circuit also addressed the small union verification issue, but decided the case without resolving it. It determined that "the procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops regardless of whether the union believes them to be excessively costly." *Id.* at 339. However, the Court limited this broad statement in a footnote, in which it pointed out that it was not addressing whether or how *Hudson* applies to small local unions because the local union there was one of "three interlocking organizations"–the local union, the state union, and the NEA. *Id.* at 340 n.2 ("[The district court's] opinion implies that *Hudson* might not require an independent auditor if the union involved were small enough. We need not decide the issue here.")

(continued...)

Harik acknowledges that "union costs [for verification] do not trump non-members' First Amendment rights," *id.*, and thus presumably there is no bye from *Hudson*'s requirement of independent auditor verification. But for "smaller unions" (we assume the Court means those with estimated annual revenues between $50,000 and $100,000), it is "confident that [they] can devise flexible and creative 'auditor-verifiable methodolog[ies]', appropriately tailored to provide their nonmembers with a reasonable opportunity for meaningful verification, without depleting the union coffers." *Id.* And "[f]or the smallest affiliates" (we assume those unions with estimated annual revenues under $50,000), *Harik* (as already noted) allows the option of providing financial reports (unaudited and, it appears, lacking any independent auditor oversight) along with "full and fair access" to the underlying financial information. The District Court in that case thus "erred . . . in requiring more than adequate accessible information using an auditor verifiable methodology that could verify [the local union's] expenditures." *Id.* In so doing, *Harik* excises "independent auditor" from *Hudson*'s "verification by an independent auditor," 475 U.S. at 307 n.18, 106 S.Ct. 1066, at least "[f]or the smallest [union] affiliates." *Harik,* 326 F.3d 1042, 1048-49. Instead, "verification" can mean producing "adequate accessible information using an auditor verifiable methodology." *Id.* We do not find this an available option unless the Supreme Court tells us otherwise.

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[6] (...continued)
(internal citation omitted). While *Andrews* did not provide any basis for us to determine whether the local unions at issue were larger than SAEA, we note that SAEA too is part of "three interlocking organizations"–SAEA, PSEA, and NEA.

Were we writing on a clean slate, we might well require something less rigorous for small local unions than independent auditor verification. But the slate is not clean. We are bound by the Supreme Court's decision in *Hudson,* and its directive of "verification by an independent auditor" means just that. *Hudson* implied no intent to make the audit requirement depend on the size of the reporting union.[7] **[133]**Absent a counter directive by the Supreme Court, we likewise make no exception. *See Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (stating that "[i]f a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions") (quoting *Rodriguez*

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[7] The Unions note that, in the NLRB context, some courts have approved what is known as the "local presumption"–an assumption that the percentage of chargeable to nonchargeable expenses will be the same for the local union as for the parent union. *See, e.g., Finerty v. NLRB,* 113 F.3d 1288, 1292-93 (D.C.Cir.1997); *see also Thomas v. NLRB,* 213 F.3d 651, 659-60 (D.C.Cir.2000); *Price v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.,* 927 F.2d 88, 93-94 (2d Cir.1991) (approving use of local presumption). Courts presented with First Amendment questions in the public employer context have not approved of the local presumption, however. *See, e.g., Lowary v. Lexington Local Bd. of Educ.,* 903 F.2d 422, 431 (6th Cir.1990); *Prescott,* 177 F.3d at 1108. Whatever the validity of the local presumption, it is irrelevant to the question presented in this case. The local presumption is merely a method for estimating a local union's ratio of chargeable to nonchargeable expenses. At issue here is whether an auditor must verify the total expenses to which that ratio may be applied. *See Hohe,* 956 F.2d at 410 (in a case in which a union attempted to apply the local presumption, holding disclosure to non-members inadequate because "[t]he notice . . . to nonmembers did not disclose the affiliated locals' 'major categories of expenses' nor was there any assertion that the locals' categories of expenses mirrored those of [the state union].").

de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)) (alteration in original).

But what level of independent auditor verification does *Hudson* require? Broadly speaking, auditors can provide three different types of accounting services: compilations, reviews, and audits. A compilation is the "lowest level of assurance" regarding an entity's financial statements. Christian Tregillis, *Overview of Services Provided by CPAs, in Basics of Accounting & Finance: What Every Practicing Lawyer Needs to Know* 88 (PLI Corp. Law & Practice Course, Handbook Series No. B-1064, 1998). It expresses "neither an opinion nor any level of assurance." *Id.* When performing a compilation, an accountant need not "verify or corroborate the financial statement information provided by the client." Jane Dillard-Eggers, *Understanding Compilations, Reviews, and Audits, at* http://www.tscpa.com/public/small/businessarticles/understanding_compilations.htm.

A review involves an intermediate level of scrutiny in which the auditor provides "limited assurance" on the entity's financial statements. *See id.* In so doing, the auditor indicates that he "is not aware of any material modifications needed to be in conformity with [generally accepted accounting principles, also known as GAAP.]" *Tregillis,* supra, at 88. In order to provide this "limited assurance," the auditor must make some, but not comprehensive, inquiry into client management, accounting practices, internal control structure, and analytical procedures used by the organization. *See* Dillard-Eggers, *supra.* The scope of the "inquiry and analytical procedures are the major difference between a review and a compilation." Larry P. Bailey, *GAAS Guide: A Comprehensive Restatement of Generally Accepted Auditing Standards* 16.31 (1994).

In an audit, which provides "the highest level of assurance on financial statements," the accountant "provides *verification* of the financial statements' claims and assertions" and expresses an opinion on the entity's financials. *Tregillis,* supra, at 85 (emphasis added). Among other procedures, the accountant "consider[s] and evaluate[s]. . . the internal control system of the [client] . . . [and] tests . . . the underlying documentation to support account balances." Dillard-Eggers, *supra; Bailey, supra,* at 16.51. Annual audits are required for all publicly traded companies. *Tregillis,* supra, at 85.

[134]As between a review and an audit, "[a] review may bring to the accountant's attention significant matters affecting the financial statements, but it does not provide assurance that the accountant will become aware of all significant matters that would be disclosed in an audit." 1 John R. Clay *et al., Guide to Compilation and Review Engagements* §101.5 (24th ed.2002). This is because "a review does not contemplate obtaining an understanding of the internal control structure or assessing control risk; tests of accounting records and of responses to inquiries by obtaining corroborating evidential matter through inspection, observation or confirmation; and certain other procedures ordinarily performed during an audit." *Id.*

We hold that local unions, regardless of their size, are required to obtain audits of their financial statements. Compilations and reviews do not provide an adequate basis for a nonmember to decide whether to object to a fair-share fee. *See Prescott,* 177 F.3d at 1107 ("[A]n audit, as opposed to a review, offers at least some verification of the amounts disclosed in the financial statement. . . . We do not see how a mere review of the union's records can offer the 'verification' that the Supreme Court and we have spoken of."). Indeed, "verification"–the word

used by the Supreme Court in *Hudson,* 475 U.S. at 307 n.18, and by at least one accounting authority in describing an audit, *see* Tregillis, *supra,* at 85–means authenticating or confirming the truth or accuracy of a statement. *Webster's Third New Int'l Dictionary of the English Language Unabridged* 2543 (1971). Put another way, an audit "make[s] assurance double sure." William Shakespeare, *Macbeth* act 4, sc. 1, line 96 (W.J. Craig, ed., Oxford 1914). A review does not.[8]

We take no position on the precise procedures an accountant must follow when auditing a local union.[9] Like the Second Circuit in *Andrews v. Education Association of Cheshire,* 829 F.2d 335, 340 (2d Cir.1987), and the Sixth Circuit in *Gwirtz v. Ohio*

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[8] We recognize that accountants review rather than audit public corporations' interim financial statements, D. Edward Martin, *Attorney's Handbook of Accounting, Auditing and Financial Reporting* § 13.03[1] (4th ed.2002), and that investors rely on these unaudited interim financial statements when making investment decisions. Despite this industry practice, we believe that, until the Supreme Court tells otherwise, *Hudson* forecloses the argument that a review is acceptable in this context.

[9] However, we read literally *Hudson*'s requirement of auditor independence and therefore require that the accountant performing the audit be truly independent of the local union, *i.e.,* not an accountant employed in-house by the union. *See Ferriso v. NLRB,* 125 F.3d 865, 871-73 (D.C.Cir.1997) (holding that *Hudson* requires an auditor to have "independence and qualifications [that] conform to prevailing norms for audits of comparable entities."). *But see Int'l Ass'n of Machinists & Aerospace Workers v. NLRB,* 133 F.3d 1012, 1017 (7th Cir.1998) (Posner, J.) (explicitly declining to follow *Ferriso* because "'[i]ndependence' is a slippery term" and cases requiring absolute independence failed to "consider alternatives" and are "in tension with cases . . . that hold that dissenters are not entitled to the highest level of audit services that the market offers").

Education Association, 887 F.2d 678, 680 (6th Cir.1989), we decline to hold either that an accountant's audit procedures must constitute the "least restrictive process imaginable," *Andrews,* 829 F.2d at 340, or that local unions must obtain the " 'highest' possible level of audit service," *Gwirtz,* 887 F.2d at 680. *See generally Prescott,* 177 F.3d at 1107 (noting that audits "may vary in procedures and sampling rates"). We do note, however, that *Hudson* does not require absolute precision within the audit context. *See* **[135]***Hudson,* 475 U.S. at 307 n.18 ("We continue to recognize that there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'") (quoting *Allen,* 373 U.S. at 122, 83 S.Ct. 1158) (alteration in original).[10]

We recognize that our decision might place high costs on some local unions. But this is how we read *Hudson*'s requirement of "verification by an independent auditor." *Id.* Further, local unions are not without options. For example, unions without the financial wherewithal to afford the *Hudson*-required audit might choose to enter into combinations with other small unions to achieve necessary economies of scale. In the alterna-

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[10] In this vein, we follow other circuits that have held that the independent audit requirement does not require the auditor to verify the local union's classification of expenses as chargeable or nonchargeable. *See, e.g., Dashiell v. Montgomery County, Md.,* 925 F.2d 750, 755-56 (4th Cir.1991); *Gwirtz,* 887 F.2d at 682 n. 3; *Ping v. Nat'l Educ. Ass'n,* 870 F.2d 1369, 1374 (7th Cir.1989); *Andrews,* 829 F.2d at 340. We agree with these circuits that chargeability is a legal question. *Dashiell,* 925 F.2d at 755-56; *Gwirtz,* 887 F.2d at 682 n. 3; *Ping,* 870 F.2d at 1374; *Andrews,* 829 F.2d at 340. To require an accountant to verify that a union has correctly classified expenditures is "tantamount to requiring the auditor to give a second legal opinion," *Dashiell,* 925 F.2d at 756, which is clearly beyond the scope of an auditor's duties.

tive, state or national unions might choose to subsidize the cost of local unions' audits.

C. Litigation Expenditures

Plaintiffs' fair-share fees include charges for collective-bargaining-related litigation conducted by PSEA or its affiliates but unrelated specifically to the SAEA unit. Such expenses are known as extra-unit litigation expenses. Plaintiffs contend that the extra-unit litigation expenses at issue are nonchargeable. *See Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exps., & Station Employees,* 466 U.S. 435, 453, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984) (holding certain litigation expenses not incurred on behalf of non-members' bargaining unit unchargeable to those non-members). The Unions argue that, because the litigation expenses at issue are "pooled" across PSEA affiliates, these expenses are chargeable to non-union members. *See Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 524, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (holding that a union may charge non-members for their *pro rata* share of certain expenses incurred pursuant to a cost- sharing agreement with affiliate unions). This case requires us to address an expense-chargeability issue that lies in the intersection of the *Ellis* and *Lehnert* holdings: whether a union may charge non-members for their *pro rata* share of expenses that relate to litigation ***and*** that were incurred on behalf of an affiliate union pursuant to a cost-sharing agreement.

As noted, *Ellis* holds that a union may not charge non-union members for certain extra-unit litigation expenses.[11] *Ellis,*

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[11] Examples of the disputed litigation expenses in *Ellis* included "the

(continued...)

466 U.S. at 453, 104 S.Ct. 1883 (while expenses of collective-bargaining-related litigation **[136]**arising from the non-members' bargaining unit are "clearly chargeable" to that employee, "[t]he expenses of litigation not having such a connection with the [non-members'] bargaining unit are not to be charged to objecting employees").[12] But *Ellis* did not involve expenses incurred by an affiliate bargaining unit pursuant to an expense-pooling arrangement with that affiliate. Here, PSEA and its affiliates have agreed to pool their litigation expenses for the unions' mutual benefit. This presents a significantly different question than *Ellis*. Even if a local union party to such an arrangement does not litigate in any given year, it still derives a tangible benefit from participating in an expense-pooling

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[11] (...continued)
union's challenge to the legality of the airline industry's Mutual Aid Pact, under which a struck carrier receives substantial financial assistance from non-struck carriers; the protection of employees' rights during bankruptcy proceedings involving an employer; the doctrine of fair representation; and the defense of suits alleging violation of the nondiscrimination requirements of Title VII." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exps., & Station Employees,* 685 F.2d 1065, 1073 (9th Cir.1982), *aff'd in part and rev'd in part,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984).

[12] While *Ellis* interpreted the Railway Labor Act ("RLA") rather than the First Amendment, subsequent cases have suggested that RLA cases such as *Ellis* "necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments." *Lehnert,* 500 U.S. at 516; *see also Romero v. Colegio De Abogados De P.R.,* 204 F.3d 291, 298 (1st Cir.2000) ("Although the decision [in *Ellis*] turned on a statutory interpretation of the Railway Labor Act, the Court was clear that its interpretation was required to avoid constitutional difficulty. Later cases have interpreted *Ellis* as setting forth constitutional rules . . . .") (internal citations omitted).

agreement: the availability of on-call resources greater than those it could muster individually. *Cf. Finerty v. NLRB*, 113 F.3d 1288, 1292 (D.C.Cir.1997) ("It is indisputable that, by pooling its resources on a union-wide basis, a union, which is the bargaining representative of *all* its members, provides some benefit to members of the various local unions.") (emphasis in original). Moreover, it is unclear whether the *Ellis* Court would have reached the same result if the extra-unit litigation at issue were more related to the collective bargaining activities of the *Ellis* plaintiffs' bargaining unit. In other words, it is unclear whether the Court intended to state a *per se* rule against the chargeability of extra-unit litigation expenses.

In *Lehnert,* the Supreme Court held that a union may charge non-union members for their *pro rata* share of expenses incurred on behalf of affiliate bargaining units when there is "some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Lehnert,* 500 U.S. at 524, 111 S.Ct. 1950.[13] A majority of the Court in *Lehnert* reached this conclusion by applying a three-part test to assess whether a particular union affiliate's expense is chargeable to non-members of the union. "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of

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[13] The dissent also endorsed this result, even though it would have reached that conclusion through a different analytical path. *See Lehnert,* 500 U.S. at 561-62, 111 S.Ct. 1950 (Scalia, J., concurring in the judgment in part and dissenting in part).

an agency or union shop." *Id.* at 519, 111 S.Ct. 1950.[14] However, when the *Lehnert* Court attempted to apply this test to a question similar to the one before us–whether expenses for reporting on extra-unit litigation, where litigation expenses are incurred pursuant to a cost-pooling agreement with an affiliate union, are **[137]**chargeable to non-members of the local bargaining unit–no five justices agreed.

Justice Blackmun, joined by Chief Justice Rehnquist and Justices White and Stevens, noted that dissenting employees may not be charged for the costs of union literature reporting on extra-unit litigation because they cannot be charged for such litigation itself under *Ellis*. *Id.* at 528, 111 S.Ct. 1950. He acknowledged that litigation conducted by one bargaining unit could establish precedents useful to another bargaining unit. But he concluded that this potential benefit was too attenuated and that "extraunit litigation [is] more akin to lobbying [which is not chargeable] in both kind and effect." *Id.*[15] Were Justice

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[14] While this test was in a plurality opinion of Chief Justice Rehnquist and Justices Blackmun, White and Stevens, *see Lehnert,* 500 U.S. at 519, a fifth justice, Justice Marshall, joined the portion of the plurality opinion containing the test, *see id.* at 534, 111 S.Ct. 1950 (Marshall, J., concurring in part and dissenting in part).

[15] Justice Marshall, who otherwise concurred in Justice Blackmun's opinion, emphasized that *Lehnert* concerned the chargeability of a union's *reporting* on extra-unit litigation. Chargeability of reporting is different from chargeability of the litigation itself. This disagreement about the scope of the issues before the Court led Justice Marshall to dissent on this issue. He would have held reporting on extraunit litigation expenses chargeable, "particularly since the publication costs at issue are *de minimis* " and involved only "a few pennies." *Lehnert,* 500 U.S. at 534, 546, 111 S.Ct. 1950. (Marshall, J., concurring in

(continued...)

Blackmun able to garner five justices' votes for the proposition that extra-unit litigation is not chargeable to non-union members, *Lehnert* would control here. However, as we discuss, he wrote only for a plurality of four.

Justice Scalia, joined by Justices O'Connor and Souter, "agree[d] with the Court's disposition of many of the challenged expenditures," but disagreed with the majority's three-part test for evaluating the chargeability of expenditures. *Lehnert,* 500 U.S. at 550, 111 S.Ct. 1950 (Scalia, J., concurring in the judgment in part and dissenting in part). Rather, Justice Scalia would permit expenses to be charged to non-members when those expenses are incurred as part of "the union's statutory duties as exclusive bargaining agent." *Id.* However, he did not apply his preferred test to the question whether dissenting employees could be charged for the expenses of union reporting on extra-unit litigation (or for the expenses of extra-unit litigation itself).

Justice Kennedy, who endorsed Justice Scalia's rather than Justice Blackmun's chargeability test, wrote separately to argue that extra-unit litigation expenditures should be allowed if "undertaken in the course of the union's duties as exclusive bargaining representative." *Lehnert,* 500 U.S. at 563, 111 S.Ct. 1950 (Kennedy, J., concurring in the judgment in part and dissenting in part). He criticized Justice Blackmun's reliance on *Ellis* to resolve the question whether costs of reporting on extra-unit litigation are chargeable, pointing out that *Ellis* did not

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[15] (...continued)
part and dissenting in part).

address a litigation-cost-sharing arrangement. *Id.* at 564, 111 S.Ct. 1950.

Despite the fact that no five justices explicitly agreed on the chargeability of expenses arising from extra-unit litigation, plaintiffs insist that *Lehnert* controls our disposition of the litigation-expenditures issue. They contend that because Justice Scalia was clear when he disagreed with the Court's rulings on other expenditures, he must have agreed with Justice Blackmun's position that extra-unit litigation expenditures are not chargeable. We disagree with the plaintiffs' interpretation of Justice Scalia's opinion, for his silence is inconclusive.[16] We are therefore left with- **[138]**out definitive Supreme Court guidance. *See Planned Parenthood of S.E. Pa. v. Casey,* 947 F.2d 682,

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[16] We note that application of Justice Scalia's chargeability standard does not necessarily result in the prohibition against pooled extra-unit litigation expenses that Justice Blackmun espoused. A union's incurring extra-unit litigation expenses might, under some circumstances, be "essential to [the union's] discharge of its duties as bargaining agent." *Lehnert,* 500 U.S. at 560, 111 S.Ct. 1950 (quoting *Ellis,* 466 U.S. at 448-49, 104 S.Ct. 1883) (Scalia, J., concurring in the judgment in part and dissenting in part). Moreover, Justice Scalia's willingness to consider as a chargeable expense an annual fee assessed by a national union to a local bargaining unit to ensure the availability of on-demand services, *id.* at 561-62, 111 S.Ct. 1950, suggests that he might also be willing to consider as chargeable a local bargaining unit's *pro rata* share of pooled litigation expenses. That *pro rata* assessment is essentially an annual fee to ensure the availability of litigation resources to the local unit–a form of insurance. We therefore disagree with the Tenth Circuit's conclusion in *Pilots Against Illegal Dues v. Air Line Pilots Association,* 938 F.2d 1123, 1130 n. 4 (10th Cir.1991), that a majority of the *Lehnert* Court would not allow extra- unit litigation expenses incurred pursuant to a pooling agreement to be charged to non-union members.

693 (3d Cir.1991), *aff'd in part and rev'd in part,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (stating that a putative majority standard must "necessarily produce results with which a majority of the Court from that case would agree").

The Sixth Circuit, the Court of Appeals from which *Lehnert* was appealed to the Supreme Court, addressed the issue before us in *Reese v. City of Columbus,* 71 F.3d 619 (6th Cir.1995). The Court agreed with Justice Marshall that the *Lehnert* plurality's statement on extra-unit litigation expenses was "no more than *dicta* " because at issue was the cost of reporting on extra- unit litigation. *Id.* at 623-24. It then proceeded to find that *Lehnert* not only allowed, but required, it to approve the charges "because a majority [in *Lehnert*] approved of charges for pooled expenses like those in this case." *Id.* at 624. While *Reese* overstates *Lehnert*'s holding, as the *Lehnert* majority never held extra-unit litigation expenses incurred pursuant to a pooling agreement to be chargeable, we nonetheless agree with the Sixth Circuit's conclusion.

Moreover, in *International Association of Machinists & Aerospace Workers v. NLRB,* 133 F.3d 1012 (7th Cir.1998), the Seventh Circuit enforced an NLRB decision in which the NLRB rejected as a matter of law the proposition that extra-unit litigation expenses should be treated differently from other extra-unit expenses and instead "appl[ied] the same standard for determining the chargeability of litigation expenses as we are required . . . to apply to all other expenses." *Cal. Saw & Knife Works,* 320 N.L.R.B. 224, 239 (1995). The Seventh Circuit agreed that litigation expenditures are "analytically identical" to other expenditures related to collective bargaining. *International Ass'n of Machinists & Aerospace Workers,* 133 F.3d at 1016.

We too uphold the chargeability of the extra-unit litigation expenses at issue by applying the *Lehnert* majority's three-part chargeability test: "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519, 111 S.Ct. 1950. First, that the litigation expenses at issue were incurred pursuant to an expense-pooling arrangement makes the *pro rata* share of those expenses charged to SAEA members and non-members akin to insurance. *See id.* at 523, 111 S.Ct. 1950 (noting that because "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational **[139]**resources when the local is in need of them, "the portion of a local's fair-share fee that "contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year"). The "premium" that SAEA members and non-members pay, in the form of a *pro rata* share of litigation expenses, ensures that the local bargaining unit will have sufficient resources at its disposal should it need, in the future, to engage in collective-bargaining-related litigation (which would be chargeable to non-union members). Because the extra-unit litigation expenditures at issue ensure the availability of resources for collective-bargaining-related litigation, those expenditures are germane to collective-bargaining activity.

Applying the second prong of the *Lehnert* test, we note that the free-rider concerns applicable to other pooled-expense arrangements apply with equal force to extra-unit litigation expenditures.

Third, extra-unit litigation expenses present "little additional infringement of First Amendment rights beyond that already accepted," *Ellis,* 466 U.S. at 456, 104 S.Ct. 1883, as here, the pooled litigation resources are expended on collective-bargaining-related activities and "may ultimately inure to the benefit of the members of the local union," *Lehnert,* 500 U.S. at 524, 111 S.Ct. 1950. That non-litigation, collective-bargaining-related expenses for, *inter alia,* pooled negotiating advice and informational assistance in *Lehnert* are chargeable to objecting employees informs our conclusion.

Unlike the Justice Blackmun camp in *Lehnert,* we discern no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses. Thus we conclude that they are chargeable to SAEA's non-members.

D. Multi-occupational representation

In addition to providing services to education professionals, PSEA's affiliated local associations also provide collective-bargaining-related services to healthcare professionals. When PSEA calculates the expenses chargeable to fair-share payers, it does not allocate chargeable costs by profession. Rather, it includes as part of fair-share fees the expenses incurred on behalf of all represented employees, *i.e.,* educators and healthcare professionals. Plaintiffs argue that the First Amendment bars PSEA from passing onto them costs incurred on behalf of healthcare professionals because PSEA has not shown that those costs "may ultimately inure to [their education unit's] benefit . . . by virtue of [its] membership in [PSEA]." *Lehnert,* 500 U.S. at 524, 111 S.Ct. 1950.

The District Court granted summary judgment in favor of the Unions, holding that the plaintiffs failed to allege facts suggesting that any of the three *Lehnert* requirements were not satisfied (to repeat, that the expenditures are not " 'germane' to collective-bargaining activity," not "justified by the government's vital policy interest in labor peace and avoiding 'free riders, '"or that they "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop"). *Id.* at 519, 111 S.Ct. 1950. In so doing, the District Court improperly placed the burden of proof on the plaintiffs when it belonged on the Unions. As *Lehnert* points out, "[t]he union [bore] the burden of proving the proportion of chargeable expenses to total expenses." *Id.*

Because plaintiffs do not challenge any particular expenditures, we evaluate, **[140]**as a matter of law, whether PSEA may pool costs across occupational groups. We answer this question affirmatively. As discussed above, *Lehnert* held that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit," so long as there is "some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Id.*

In our case, the pooling arrangement confers potential benefits on the plaintiffs. First, the arrangement generates economies of scale that redound to their benefit. Second, by spreading the costs of otherwise-chargeable expenses over a pool of employees whose chargeable-expense levels are not perfectly correlated with their own (*i.e.,* healthcare professionals as well

as education professionals), education professionals reduce their risk of being assessed unusually high chargeable expenses in any given year. Moreover, this pooling arrangement does not necessarily increase the dollar amount of chargeable expenses assessed to plaintiffs for any particular year. Just as education professionals are assessed for healthcare professionals' chargeable expenses, so too healthcare professionals are assessed for education professionals' chargeable expenses. As PSEA correctly points out, this arrangement may result in lower fair-share fees than those assessed in the absence of such an arrangement.

We also note that the *Lehnert* Court did not limit its holding only to bargaining units within the same industry, or within related industries. Instead, it stated a broad principle: "that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." *Id.* at 523, 111 S.Ct. 1950. Though this reasoning was not that employed by the District Court, it nonetheless supports its ultimate grant of summary judgment to the Unions.[17]

* * * * *

We reverse the District Court's grant of summary judgment in favor of the plaintiffs on the issue of charging them fair-share fees for extra-unit litigation expenses. In all other respects, we affirm.

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[17] We may affirm for any reason supported by the record, even if not relied on by the District Court. *Nicini v. Morra,* 212 F.3d 798, 805 (3d Cir.2000).

APPENDIX B

ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

JULY 3, 2000

[107 F. Supp. 2d 615]
Marsha OTTO, et al., Plaintiffs,
v.
PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA, et. al, Defendants.

No. 1:CV-96-1233.

United States District Court, M.D. Pennsylvania.

July 3, 2000.

* * * *

[617]*ORDER*

MUIR, District Judge.

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On July 2, 1996, Marsha Otto, F. Naylor Emory, Dennis A. Erb, Robert K. Gilbert, James W. Lossel, Barbara J. McCAlley, and Wesley S. Semple (collectively referred to hereinafter as "Plaintiffs") filed a civil rights complaint pursuant to 42 U.S.C. § 1983[1] and they filed an amended complaint on

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[1] Section 1983 reads, in relevant part, as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

(continued...)

August 30, 1996. Named as Defendants in the amended complaint are the Pennsylvania State Education Association–NEA, National Education Association, and Shaler Area Education Association (collectively referred to hereinafter as "Defendants"). The Shaler Area Education Association is the local exclusive collective bargaining representative of the Plaintiffs. The remaining two Defendants are that local union's state and national affiliates. Notwithstanding that representation the Plaintiffs are not members of any of the Defendant unions. The Plaintiffs' claims in this action stem from constitutional challenges to the Defendants' collection of certain fees and the procedures by which those fees have been collected pursuant to The Pennsylvania Fair Share Act, 71 Pa. Stat. § 575 (1990).

The Clerk of Court originally assigned this case to Judge Caldwell and referred it to Magistrate Judge Smyser for preliminary consideration. On December 16, 1997, the case was reassigned to Judge Caputo. On November 30, 1998, the case was reassigned to Judge Kane.[2] On January 13, 1997, Judge Caldwell issued an order in which he succinctly summarized the legal and factual framework of this case as follows

> The Pennsylvania Fair Share Act, 71 Pa. Stat. § 575 (1990), authorizes public employees' unions to collect fair

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[1] (...continued)
immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
42 U.S.C. § 1983.

[2] On or about June 14, 2000, we agreed to handle the outstanding pretrial motions in this case and the motions were reassigned to us for that purpose.

share fees from nonmembers to help defray the cost of the union's exclusive bargaining representation of all employees. *Id.* § 575(b). Fair share fees are calculated as the dues paid by union members, less the amounts not employed by the union in its role as exclusive representative. *Id.* § 575(a). The fair share fee is thus a percentage of the full fee paid by the union members.

Because the mandatory collection of fair share fees from nonmembers represents some degree of impairment of the nonmembers[']] First Amendment rights, the union must provide nonmembers with certain procedural safeguards. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301-03, 106 S.Ct. 1066, 1073-74, 89 L.Ed.2d 232, 243-45 (1986). The nonmember has a right to object to any portion of his or her fees being spent on political activities unrelated to the union's duties as exclusive bargaining representative. *Id.* at 301- 02, 106 S.Ct. at 1073, 89 L.Ed.2d at 244. . . .

Each year, Defendants each make a separate calculation of the percentage of **[618]**their expenses which will be applied to collective bargaining representation. This percentage is then used to determine the fair share fee to be paid by nonmembers. [The Pennsylvania State Education Association–NEA's and the National Education Association's] calculations are verified by independent audit, but Shaler Area Education Association's are not.

(Document 120, pgs. 2-3).[3]

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[3] Because that summary was incorporated into the Report and (continued...)

On October 24, 1997, the parties filed a proposed stipulation providing that Plaintiffs would limit the relief sought to declaratory and injunctive relief on the following three claims: 1) Defendant Shaler Area Education Association's calculation of its fair share fee be verified by an independent auditor; 2) Plaintiffs may not be charged for Defendants Pennsylvania State Education Association's and National Education Association's expenditures for litigation which does not involve Plaintiffs' bargaining unit; and 3) Plaintiffs may not be charged for Defendant Pennsylvania State Education Association's otherwise chargeable expenditures which involve health care professionals who are also represented by the Defendant Pennsylvania State Education Association. The stipulation further restricted the scope of those claims strictly to the 1994-95 school year. By order dated October 27, 1997, Judge Caldwell approved that stipulation. That order also provides that the parties' requests for attorneys' fees remain before the court for resolution.

On November 6, 1997, the parties filed a joint motion to resolve the case on cross-motions for summary judgment based on a stipulated set of facts filed with the court. Judge Caldwell granted that motion in an order dated November 12, 1997. The cross-motions for summary judgment were referred to Magistrate Judge Smyser.

After the cross-motions for summary judgment were fully briefed, on January 28, 1999, Magistrate Judge Smyser filed a report recommending that each motion for summary judgment

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[3] (...continued)
Recommendation of Magistrate Judge Smyser which is currently before us, and no party has objected to it, we will adopt it and rely upon it in the disposition of this case.

be granted in part and denied in part. The Magistrate Judge specifically recommended that judgment be entered in favor of the Plaintiffs on their first and second claims and that judgment be entered in favor of the Defendants on the third claim. All of the parties filed objections to that report and recommendation on February 16, 1999. Although the Defendants requested oral argument on their objections, we are of the view that such argument is neither necessary nor advisable. Those objections have been fully briefed and are ripe for disposition. This order addresses the Magistrate Judge's report and recommendations regarding the parties' cross- motions for summary judgment, to which each there are objections.[4]

When objections are filed to a report of a magistrate judge, we make a ***de novo*** determination of those portions of the report or specified proposed findings or recommendations made by the magistrate judge to which there are objections. United States vs. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); 28 U.S.C. § 636(b)(1); M.D. Pa. Local Rule 72.31.

Summary judgment is appropriate only when there is no genuine issue of material fact which is unresolved and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). Initially, the moving party has a burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corporation v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This may be met by [619]the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-

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[4] The only other pending motion is one to intervene which has been filed by Jane Campbell and Barbara Leiby. In a separate order we will rule on that motion.

moving party will bear the burden of proof at trial. *Id.* at 325, 106 S.Ct. 2548. We also note that Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 323, 106 S.Ct. 2548. Those same standards govern cross-motions for summary judgment. *Continental Ins. Co. v. Kubek,* 86 F.Supp.2d 503, 505 n. 2 (E.D.Pa.2000) (Katz, J.) (citing *Appelmans v. Philadelphia,* 826 F.2d 214, 216 (3d Cir.1987)). When considering such cross-motions "each motion must be considered separately, and each side must still establish a lack of genuine issues of material fact and that it is entitled to judgment as a matter of law." *Nolen v. Paul Revere Life Ins. Co.,* 32 F.Supp.2d 211, 213 (E.D.Pa.1998) (Robreno, J.).

When addressing a motion for such a judgment, our inquiry focuses on "whether *the evidence* presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis added). As summarized by the Advisory Committee On Civil Rules, "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed.R.Civ.P. 56 advisory committee's note to 1963 Amendment.

In this case the proof we are examining is strictly limited to the set of stipulated facts submitted by the parties. In such a case, where we are required to "draw inferences from the stipulated facts, we must still resolve them against the moving

party and in favor of the nonmoving party." *Luden's, Inc. v. Local Union No. 6,* 28 F.3d 347, 353 (3d Cir.1994) (citing cases).

The essential elements of a claim brought pursuant to 42 U.S.C. § 1983 require that the conduct complained of 1) be committed by a person acting under color of state law and 2) the conduct has deprived the plaintiffs of one of their rights, privileges, or immunities secured by the constitution or federal law. *Parrat v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds, Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The rights at issue in this case are those grounded in the First and Fourteenth Amendments guaranteeing "the freedom of an individual to associate for the purpose of advancing beliefs and ideas." *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 233, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). That freedom encompasses the right to refuse to associate. *Id.*

In *Abood* the United States Supreme Court addressed constitutional claims brought by non-union member employees challenging a Michigan statute

> authorizing a system for union representation of local governmental employees. A union and a local government employer are specifically permitted to agree to an "agency shop" arrangement, whereby every employee represented by a union–even though not a union member– must pay to the union, as a condition of employment, a service fee ....

Id. at 211, 97 S.Ct. 1782. A number of the plaintiffs in *Abood* were teachers at a public school. They challenged the constitutionality of both the public-sector union and the use of their

service fees for various union activities. *Id.* at 211-14, 97 S.Ct. 1782.

In the course of upholding the constitutionality of an agency shop arrangement in the public sector, the Supreme Court in *Abood* reiterated its prior observations that

> [t]o compel employees financially to support their collective bargaining representative has an impact upon their First **[620]**Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. . . . The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. 'The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagree's with the group's strategy. . . .'

Id. at 222, 97 S.Ct. 1782 (quoting *International Ass'n of Machinists v. Street*, 367 U.S. 740, 778, 81 S.Ct. 1784, 6

L.Ed.2d 1141 (1961)). Thus, the degree of infringement upon such employees' First Amendment rights which is inherent in a union-shop arrangement has been justified because of the governmental interest in industrial peace. *Ellis v. Broth. of Ry., Airline and S.S. Clerks*, 466 U.S. 435, 455-56, 104 S.Ct. 1883, 1896, 80 L.Ed.2d 428 (1984) (citations omitted).

In *Ellis* the plaintiffs challenged the legality of collecting fees pursuant to a union-shop arrangement which were used to fund six specific activities. The Supreme Court was required to decide whether non-union member funds could constitutionally fund three of those activities. The Court reasoned that

> [a]t a minimum, the union may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.' . . . The issue is whether these [three challenged] expenses involve additional interference with First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest.

Id., 466 U.S. at 456, 104 S.Ct. at 1896.

The United States Supreme Court's most recent relevant decision crystalized the governing standard as follows:

> [t]hus, although the Court's decisions in this area prescribe a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees, they also set forth several guidelines to be followed in making such determinations. *Hanson* and *Street* and their progeny teach that chargeable activities must (1) be

"germane" to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Lehnert, et al. v. Ferris Faculty Ass'n, et al., 500 U.S. 507, 520, 111 S.Ct. 1950, 1959, 114 L.Ed.2d 572 (1991). We will apply the above-referenced precedent in reviewing the three claims presented in Magistrate Judge Smyser's Report and Recommendation.

The first issue addressed by the Magistrate Judge is whether "Defendant Shaler Area Education Association is required to have its financial disclosure to nonmember 'fair share' feepayers verified by an independent auditor." (Document 120, pg. 10) No party objects to the manner in which Magistrate Judge Smyser framed that issue.

The parties have stipulated to the following two facts: 1) "[Shaler Area Edu-**[621]**cation Association's] membership dues for the 1994-95 school year were $50.00. Its fair-share fee for that year was $45.00," and 2) "[Shaler Area Education Association's] financial statements and its calculations described in paragraph 6 [of the stipulation] were not verified by an independent auditor." (Document 120, pg. 7) No other fact in the stipulation is relevant to this issue.

Based on those facts Magistrate Judge Smyser concluded that a case decided by the United States Supreme Court and a case decided by the Court of Appeals for the Third Circuit have resolved this issue and they dictate that we grant the Plaintiffs' motion for summary judgment on this claim. *See Chicago*

Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986); *Hohe, et al. v. Casey, et al.*, 956 F.2d 399 (3d Cir.1992). The latter decision was an appeal from a decision rendered by Judge Caldwell in this court.

The Defendants object to that conclusion, contending that the Magistrate Judge has misread and misapplied those cases to the stipulated facts. The foundation underlying that contention is the supposition that the verification-by-audit requirement discussed in *Hudson* and *Hohe* does not apply to "relatively small local unions." (Document 126, pgs. 17-18)

We are of the view that the courts' decisions *Hudson* and *Hohe,* including Judge Caldwell's Memoranda in *Hohe* reported at 695 F.Supp. 814 and 727 F.Supp. 163, refute the Defendants' contentions. In his report and recommendations Magistrate Judge Smyser properly applies *Hudson* and *Hohe*. We elaborate on his treatment of the issue simply to address the Defendants' specific objections.

In *Hudson* the United States Supreme Court stated

> [t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, . . ., for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

Hudson, 475 U.S. at 307 n. 18, 106 S.Ct. at 1076 n. 18. In that case the "union" was the local exclusive collective bargaining representative of the plaintiffs. That union directly incurred expenses on behalf of the fair share feepayers and it directly collected those fees from them. In the quoted footnote the Court required that such expenses by the local union be verified by an audit. However, in that same footnote, the court did not extend the audit requirement to amounts collected by the local union for the expenses of its state and national affiliates. The expenses at the state and national levels should be audited at those levels. The distinction between the expenses incurred by the exclusive collective bargaining representative and those incurred by its state and national affiliates is significant.

In *Hohe* this court, per the Honorable William W. Caldwell, applied the rulings in *Hudson* to a case in which both types of expenses discussed in footnote 18 of *Hudson* were considered (i.e., those incurred directly by the local exclusive collective bargaining representative of the plaintiffs, and those which were actually incurred by its non-local affiliate unions). In separate memoranda decisions, Judge Caldwell concluded that the former expenses are subject to the verification-by-audit requirement and the latter expenses, which he described as "financial information for affiliate unions" is not subject to that requirement. *Hohe v. Casey*, 695 F.Supp. 814, 818-819 (M.D.Pa.1988) (Caldwell, J.) ("*Hudson* does not require that each local expenditure be audited."), *aff'd*, 868 F.2d 69 (3d Cir.1989); *Hohe v. Casey*, 727 **[622]**F.Supp. 163 (M.D.Pa. 1989), 956 F.2d 399 (3d Cir.1992).

The Court of Appeals for the Third Circuit affirmed those conclusions in two separate reported decisions. *Id.* In its latter decision, the Court of Appeals stated

> [u]nder *Hudson,* Council 13 was required to send nonmembers notice that included "the major categories of expenses, as well as verification by an independent auditor." . . . On December 11, 1989, the district court determined that "the breakdown of chargeable and non-chargeable expenses . . . were not subjected to verification by an independent auditor as required by *Hudson.*" . . . It went on to state that "[h]aving found a violation of plaintiff's first amendment rights in the unions' *Hudson* procedure, we must determine ***an appropriate remedy.***"

Hohe, 956 F.2d at 415 (emphasis in original). Judge Caldwell concluded the appropriate remedy for failing to verify the expenses by an independent auditor was nominal damages of $1.00 to each plaintiff. The Court of Appeals affirmed that conclusion. *Id.*

None of those reported decisions draws a distinction based on the size of the union. It appears to us that all of the authority cited by Defendants relates to "financial information for affiliate unions." The relevant distinction is whether the fees at issue are used by the direct exclusive collective bargaining representative or simply an affiliate thereof. We are of the view that "financial information for affiliate unions", which need not be verified by an audit, is not at issue in this case.

For those reasons, we agree with the Magistrate Judge that the portion of the fee charged to Plaintiffs for expenses incurred directly by their local exclusive collective bargaining representative is required to be verified by an audit. The Plaintiffs are entitled to a declaratory judgment that the constitution requires Shaler Area Education Association to provide nonmembers a financial statement of its expenses that has been audited.

The fundamental issue underlying the second claim is whether the Plaintiffs "may not be charged, as plaintiffs allegedly have been charged by defendants [Pennsylvania State Education Association-NEA and National Education Association], for litigation expenditures incurred in litigation not relating specifically to the plaintiffs' own collective bargaining unit." (Document 120, pg. 13) The Magistrate Judge recommends we declare that Defendants Pennsylvania State Education Association and National Education Association are precluded from collecting those expenses from objecting feepayers and enjoin the collection of those costs from the Plaintiffs. This recommendation is based on his reading of the Supreme Court Justices' four separate opinions in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), and that court's earlier decision in *Ellis v. Broth. of Ry., Airline and S.S. Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984).

Justice Blackmun wrote the opinion of the court in *Lehnert*. In one portion of his opinion he stated that

> [w]hen unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, . . ., we hold that the Amendment

proscribes such assessments in the public sector. *Lehnert*, 500 U.S. at 528, 111 S.Ct. at 1964 (1991). A total of four Justices joined in that portion of Justice Blackmun's opinion.

The Defendants object to the recommendation on the grounds that the Magistrate Judge has again misread those cases. They specifically argue that 1) the discussion of extra-unit litigation costs in *Leh-*[623]*nert* is *dicta* and therefore irrelevant; 2) no position of any Justice in *Lehnert* on the issue commanded a majority of Justices; and 3) the *Ellis* case is inapplicable.

Although we agree that the Justices' comments on extra-unit litigation costs in *Lehnert* are *dicta*, the Court of Appeals for the Third Circuit has stated that

> we should not idly ignore considered statements the Supreme Court makes in dicta. The Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket.

McDonald v. Master Financial, Inc., et al, 205 F.3d 606 (3d Cir.2000) (noting that appellate courts which ignore dicta "frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there"). We will pay heed to Justice Blackmun's opinion on the question of extra-unit litigation fees, as did Magistrate Judge Smyser.

The relevant paragraph of Justice Blackmun's opinion, which we have quoted above, garnered the concurrence of a total of four Justices. Magistrate Judge Smyser reads Justice Scalia's concurring opinion, in which Justices O'Connor, Souter, and Kennedy joined, as the votes tipping the scales in Plaintiffs favor on this issue. In order to weigh the significance of Justice Scalia's concurrence, it is necessary to review the United States Supreme Court's prior holding in *Ellis v. Broth. of Ry., Airline*

and S.S. Clerks, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984).

In *Ellis* the Court held that it was unlawful for objecting employees to be charged for the expenses of litigation which did not concern bargaining unit employees and was not normally conducted by the exclusive bargaining representative. *Ellis*, 466 U.S. at 453, 104 S.Ct. at 1895. The Court's analysis in *Ellis* was admittedly based on the statutory interpretation of the Railway Labor Act. However, in his concurring opinion in *Lehnert*, Justice Scalia construed *Ellis* "as merely reflecting the constitutional rule." As noted above, Justices O'Connor, Souter, and Kennedy joined in that portion of Justice Scalia's opinion. We are of the view that Magistrate Judge Smyser has correctly interpreted and applied those cases.

That view is further supported by a decision of the United States Court of Appeals for the First Circuit. In *Romero v. Colegio De Abogados De Puerto Rico, et al.*, 204 F.3d 291 (1st Cir.2000), a panel of judges of that court considered an issue similar to the one currently before us and stated

> [a]lthough the decision [in *Ellis*] turned on a statutory interpretation of the Railway Labor Act, . . . the Court was clear that its interpretation was required to avoid constitutional difficulty, ... Later cases have interpreted Ellis as setting forth constitutional rules, see *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), ...

Romero, 204 F.3d at 298.

Based on the authority noted above, we adopt Magistrate Judge Smyser's second recommendation and will 1) declare that the Defendants can not constitutionally charge Plaintiffs for the extra-unit litigation expenses at issue in this case and 2) enjoin the Defendants from collecting fees based on those expenses.

The Magistrate Judge's third and final recommendation is that summary judgment be entered in favor of the Defendants because the Plaintiffs have not discharged their burden to show that they are entitled to relief on their third claim. The Plaintiffs object to that recommendation on the ground that 1) the Magistrate Judge erroneously shifted the burden of proof onto them in spite of Supreme Court case law placing the burden on the Defendants; and 2) the stipulated facts are suffi-**[624]**cient to establish the constitutional violation asserted in the third claim.[5]

As noted above, a plaintiff in a § 1983 action has the burden of showing that the defendant's conduct has deprived the plaintiff of one of his or her rights, privileges, or immunities secured by the constitution or federal law. *Parrat v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327,

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[5] The Defendants filed a brief in opposition to the Plaintiffs' objections in which they state "[w]hile defendants agree with the result [as to the third claim] we do not embrace all of the reasoning by which the Report arrives at that conclusion." The majority of their brief is, in essence, a document containing additional objections to the Magistrate Judge's report and recommendations. Because that document was not filed within the time allowed for such objections, we will not consider the objections contained therein. *See* M.D. Local Rule 72.3.

106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Although Magistrate Judge Smyser did not explicitly cite *Parratt, supra.*, as the authority supporting his conclusion as to the burden of proof, that case most definitely applies. The cases cited by the Plaintiffs regarding allocation of the burden of proof address the issue in subsequent stages of the case. We agree with Magistrate Judge Smyser's recommendation that the Plaintiffs have the prima facie burden of establishing the elements of a § 1983 claim.

Based on the principles set forth in *Hanson, Street, Abood, Ellis,* and *Lehnert,* the Plaintiffs here can meet that burden only by showing that the activities for which they have been charged (1) are not "germane" to collective bargaining activity; (2) are not justified by the government's vital policy interest in labor peace and avoiding "free riders"; *or* (3) significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. *Lehnert, et al. v. Ferris Faculty Ass'n, et al.*, 500 U.S. 507, 520, 111 S.Ct. 1950, 1959, 114 L.Ed.2d 572 (1991).

The only three relevant stipulated facts are that

> 15. PSEA's affiliated local associations represent the following types of employees: (a) teachers and other education professionals (103, 712 employees in 608 bargaining units during the 1994-95 school year); (b) education support personnel (21, 391 employees in 371 bargaining units during 1994-95); and © health-care professionals, in both the public and private sectors (approximately 1, 548 employees in 6 bargaining units during 1994-95).

16. PSEA provides generally the same kinds of services to all of its affiliated local associations, and to the members of their bargaining units, regardless of which type of employee the local association represents.

17. In calculating its dues percentage that is chargeable to fair-share feepayers, PSEA considers all of its expenditures together, calculating the ratio of all of its chargeable expenditures to all of its expenditures-rather than treating separately, and calculating separate chargeable percentages for, its expenditures attributable to services provided to educational professionals, educational support personnel, and health-care professionals.

(Document 102, paras. 15-17) The stipulated evidentiary record submitted by the parties does not provide sufficient facts for us to determine whether the activities funded by the fees relating to the Plaintiffs' third claim either (1) are not "germane" to collective bargaining activity, (2) are not justified by the government's vital policy interest in labor peace and avoiding "free riders", *or* (3) significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. Consequently, those facts do not support the conclusion that the Plaintiffs' **[625]**constitutional rights relating to that claim have been violated.

With respect to their summary judgment motion, the Plaintiffs have failed to discharge their initial burden of demonstrating, with any information of record, the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(c), (e); M.D. Pa. Local Rules 5.4, 7.3, 56.1.

The Plaintiffs are not entitled to summary judgment on that claim.

We next consider how the absence of critical facts in the record affects the Defendants' motion for summary judgment. We are of the view that the Magistrate Judge correctly notes that there is an absence of evidence to support essential elements of the Plaintiffs' third claim on which the Plaintiffs bear the burden of proof. The absence of those facts weighs in Defendants' favor because Federal Rule of Civil Procedure 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). We will grant the Defendants' motion for summary judgment on the third claim.

In closing, we note the potential significance of Federal Rule of Civil Procedure 39, entitled "Trial by Jury or by the Court." Subsection (a) of that rule, entitled "By Jury," provides in part that "[t]he trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court . . . consent to trial by the court sitting without a jury." Fed.R.Civ.P. 39(a).

On October 24, 1997, the parties jointly filed a stipulation and settlement agreement which provided in relevant part that the parties had reached an agreement "[i]n order to resolve without further litigation certain issues involved in this lawsuit, and to provide for the simplified and expeditious judicial resolution of those issues that remain unresolved." (Document 101, pg. 1) In the third paragraph of that document, the parties

stipulate that the three remaining claims in this case "shall remain for judicial resolution." (Document 101, pg. 2, para. 3) In the fifth paragraph of that document "[t]he parties agree that no further discovery will be necessary for litigation of the remaining issues in this case." (Document 101, pg. 3, para. 5)

In their joint motion to establish the procedures for their cross-motions for summary judgment, which was filed on November 6, 1997, the parties described their October 24, 1997, documents as "reserv[ing] three questions of law for adjudication by this Court pursuant to the stipulated facts." (Document 104) On November 12, 1997, the Honorable William W. Caldwell granted that motion, which allowed the parties to deviate from the standard local rules relating to motions for summary judgment. (Document 105)

Although Rule 39(a) is not referenced in any of the documents filed by the parties, we will construe their stipulation, settlement agreement, and motion for summary judgment collectively as a Rule 39(a) stipulation that we may resolve the three remaining claims based solely on the stipulated facts. Our view is based primarily on the language employed in their filings seeking "expeditious judicial resolution" of those claims. We also note that no party has objected to the Magistrate Judge's report on the basis that additional facts should be supplied to the court, or that the case should be listed for trial on the third claim.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The report and recommendation of Magistrate Judge Smyser is adopted.

2. Plaintiffs' objections to that report and recommendation are overruled.

[626]3. Defendants' objections to that report and recommendation are overruled.

4. Plaintiffs' motion for summary judgment (Doc. 106) is granted in part and denied in part as set forth in ¶¶ 5, 6, and 7 hereafter.

5. Plaintiffs' motion for summary judgment (Doc. 106) on the claim that Defendant Shaler Area Education Association's calculation of its fair share fee is required to be verified by an independent auditor is granted.

6. Plaintiffs' motion for summary judgment (Doc. 106) on the claim that Plaintiffs may not be charged for Defendants Pennsylvania State Education Association's and National Education Association's expenditures for litigation which does not involve Plaintiffs' bargaining unit is granted.

7. Plaintiffs' motion for summary judgment (Doc. 106) on the claim that Plaintiffs may not be charged for Defendants' otherwise chargeable expenditures which involve health care professionals who are also represented by the Defendant Pennsylvania State Education Association is denied.

8. A declaratory judgment shall be entered providing that the Defendants can not constitutionally charge Plaintiffs for the extra-unit litigation expenses at issue this case.

9. The Defendants are enjoined from collecting fees based on the extra-unit litigation expenses at issue in this case.

10. Defendants' motion for summary judgment (Doc. 110) is granted in part and denied in part as set forth in ¶¶ 11, 12, and 13 hereafter.

11. Defendants' motion for summary judgment (Doc. 110) on the claim that Defendant Shaler Area Education Association's calculation of its fair share fee is required to be verified by an independent auditor is denied.

12. Defendants' motion for summary judgment (Doc. 110) on the claim that Plaintiffs may not be charged for Defendants Pennsylvania State Education Association's and National Education Association's expenditures for litigation which does not involve Plaintiffs' bargaining unit is denied.

13. The Defendants' motion for summary judgment (Doc. 110) on the claim that Plaintiffs may not be charged for Defendants' otherwise chargeable expenditures which involve health care professionals who are also represented by the Defendant Pennsylvania State Education Association is granted.

14. The Clerk of Court shall send a copy of this order to the Hon. Yvette Kane and the Hon. Andrew J. Smyser.

* * * *

APPENDIX C

REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JANUARY 28, 1999.

[1999 WL 177093]
United States District Court, M.D. Pennsylvania.

Marsha OTTO, F. Naylor Emory, Dennis A. Erb, Robert K. Gilbert, James W.Lossel, Barbara J. McCalley and Wesley S. Semple, Plaintiffs

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA, National Education Association, Grove City Area Association and Shaler Area Education Association, Defendants

No. CIV. 1:CV-96-1233.

Jan. 28, 1999.

* * * *

REPORT AND RECOMMENDATION

SMYSER, Magistrate J.

[*1]This civil action was initiated by a complaint filed on July 2, 1996. An amended complaint (Doc. 19) was later filed on August 30, 1996. A case management order was entered in the case on October 22, 1996. Doc. 22.

The action is brought under 42 U.S.C. § 1983, challenging certain of the procedures used by the defendants, who are national, state and local collective bargaining organizations and

teachers unions, in collecting "fair share" fees from the plaintiffs, who are union nonmembers.

The Court has stated the background of the case in the Memorandum of January 13, 1997 (Doc. 63), as follows:

> Defendants are affiliated national, state and local teachers' unions. Plaintiffs are seven nonunion public school employees, who challenge certain aspects of Defendants' collection of fair share fees for the 1994-95 and 1995- 96 academic years.
>
> The Pennsylvania Fair Share Act, 71 Pa. Stat. § 575 (1990), authorizes public employees' unions to collect fair share fees from nonmembers to help defray the cost of the union's exclusive bargaining representation of all employees. *Id.* § 575(b). Fair share fees are calculated as the dues paid by union members, less the amounts not employed by the union in its role as exclusive representative. *Id.* § 575(a). The fair share fee is thus a percentage of the full fee paid by union members.
>
> Because the mandatory collection of fair share fees from nonmembers represents some degree of impairment of the nonmembers First Amendment rights, the union must provide nonmembers with certain procedural safeguards. *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 301-03, 106 s. Ct. 1066, 1073-74, 89 L.Ed.2d 232, 243-45 (1986). The nonmember has a right to object to any portion of his or her fees being spent on political activities unrelated to the union's duties as exclusive bargaining representative. *Id.* at 301-02, 106 S.Ct. At 1073, 89 L.Ed.2d at 244. The union must also provide some

opportunity for a nonmember who objects to the calculation of the fee to have his or her objections resolved by "a reasonably prompt decision by an impartial decisionmaker." *Id.* at 307, 106 S.Ct. At 1076, 89 L.Ed.2d at 247.

Each year, Defendants each make a separate calculation of the percentage of their expenses which will be applied to collective bargaining representation. This percentage is then used to determine the fair share fee to be paid by nonmembers. NEA's and PSEA's calculations are verified by independent audit, but SAEA's calculations are not.

Nonmembers receive a "Notice to Fair Share Feepayers" each year, detailing the fair share fees and the underlying calculations. (Complaint, ex. A). The Notice provides that nonmembers may challenge [Footnote omitted.] the calculation of the fair share fee, by notifying PSEA in writing. Such disputes are resolved through binding arbitration. (Complaint, ex. A at 18).

Plaintiffs received the Notice to Fair Share Feepayers for the years in question, and paid their fair share fees without invoking the challenge procedure.

[*2]Plaintiffs, through their amended complaint, now allege that Defendants have failed to provide all of the required procedural safeguards. Specifically, Plaintiffs allege: (1) that SAEA's failure to have its fair share fee calculations independently audited violates the constitutional limitations on fair share fees; (2) that Defendants' arbitration procedure fails to provide a reasonably prompt resolution of fee disputes by an impartial decisionmaker;

and (3) that Defendants' calculation of fair share fees improperly applied fees to union activities not reasonably related to representation.

By the Order of January 13, 1997, the Court dismissed the amended complaint in part, granting the defendant's motion to dismiss the amended complaint as to the plaintiffs' claim that the defendants' arbitration procedure fails to provide a reasonably prompt resolution of fee disputes by an impartial decisionmaker. In an Order filed on June 3, 1997, the Court denied the plaintiffs' motions for the certification of a class of plaintiffs.

Upon the expiration of the deadline as established in the case management order for the parties to exercise their option to elect to consent to proceed in all further proceedings before a magistrate judge, and upon the parties' failure to notify the Court of their election, a memorandum from the magistrate judge to the District Court Judge was sent recommending that a trial date and pretrial conference date be set by Judge Caldwell. After the entry of a new procedural order, by Judge Caldwell, on September 30, 1999 (Doc. 99), the parties agreed to the stipulated dismissal of all claims in the lawsuit other than the plaintiffs' claims for declaratory and injunctive relief. See, Doc. 100. Under the Stipulation, the remaining claims for declaratory and injunctive relief are limited to plaintiffs' contentions that: (a) defendant Shaler Area Education Association's calculation of its fair share fee must be verified by an independent auditor; (b) plaintiff may not be charged for the defendants' expenditures for litigation, even though reasonably employed to implement or to effectuate the duties of the exclusive representative, that does not concern the individual member's bargaining unit; and (c) plaintiffs may not be charged for defendants' expenditures for otherwise chargeable activities involving health

care professionals. The parties then filed cross motions for summary judgment on a stipulated set of facts. Shortly after these motions had been filed, and while the case was in an unremanded status before Judge Caldwell, the case was transferred, on December 16, 1997, as a part of case reassignments, upon the entry of a new judge, to Judge Caputo. On November 30, 1998, the case was again reassigned, on the same basis, to Judge Kane. The summary judgment motions were fully briefed in December of 1997, and they are ripe for decision by the Court. By Order of January 11, 1999, the case was remanded to the magistrate judge for a Report and Recommendation addressing the pending motions. This Report and Recommendation addresses the pending motions for summary judgment. The parties agree that the motions may be decided on the basis of stipulated facts. These stipulated facts are as follows:

A. FACTS RELATING TO THE LOCAL AUDIT ISSUE

[*3]1. Defendant Shaler Area Education Association ("SAEA") represents a bargaining unit of approximately 355 teachers and other education professionals. Of these, 344 were members of SAEA, and the remaining 11 were fair-share feepayers during the 1994-95 school year.

2. SAEA is operated as a volunteer organization. It has no employees. Its officers are full-time teachers who conduct the Association's affairs in their free time, although they do receive honoraria for their Association work (which in 1993-94 totaled $7,554.00).

3. SAEA's total expenditures for the 1993-94 fiscal year were $22,102.00.

4. SAEA's membership dues for the 1994-95 school year were $50.00. Its fair-share fee for that year was $45.00.

5. SAEA's ledger of income/expenditures for the 1993-94 fiscal year is attached [to the Stipulation].

6. SAEA's calculation of the chargeable and nonchargeable portions of its 1993-94 expenditures and of its fair-share fee for 1994-95 was made by SAEA's then-treasurer, Donald Deets, in accordance with the procedures set out in the Notice to Fair Share Feepayers, the relevant portion of which is attached [to the Stipulation], and PSEA's instructions for preparing the local fair share fee calculation form, attached [to the Stipulation]. The actual calculations are shown on SAEA's Fair Share Fee Calculation for 1994-95 School Year, attached [to the Stipulation], which was also part of the Notice to Fair Share Feepayers.

7. SAEA's financial statements and its calculations described in paragraph 6 were not verified by an independent auditor.

8. Had SAEA commissioned an independent audit of its financial statements for the 1993-94 fiscal year, the cost to SAEA would have been approximately $1,025.00. An affidavit by Certified Public Accountant John P. Lavery setting forth this estimate is attached [to the Stipulation].

9. As a condition for PSEA's administration of the fair-share program on behalf of local associations, SAEA, like other local associations, is required to submit to PSEA's

Financial Management Department its Fair-Share Fee Calculation form based on prior-year expenditures, its budget for the current year, and, since 1995-96, a Summary of Chargeable Expense worksheet or similar spreadsheet. The PSEA Financial Management Department verifies the Fair-Share Fee Calculation form for mathematical accuracy, and subtracts a 2% buffer from the local's chargeable percentage to provide an additional safeguard against minor errors that may have occurred. [References to Exhibits omitted.]

10. Each year, all SAEA fair-share feepayers are provided, as part of the Notice to Fair Share Feepayers distributed by PSEA, with an explanation of the procedures by which SAEA's fair-share fees are calculated, SAEA's Fair-Share Fee Calculation form, and SAEA's budget for the current year. [References to Exhibits omitted.]

11. Defendants represent that, beginning with the 1997-98 school year, PSEA's Notice to Fair Share Feepayers will include a statement to the effect that a nonmember who pays a fair share fee to any local association that does not provide an audit of its financial statements will be permitted, on reasonable terms and conditions, to inspect the local association's detail of expenditures that are the basis for its fee calculation, for the purpose of making a determination of whether to challenge the fair share fee assessed by the local association.

B. FACTS RELATING TO EXTRA-UNIT LITIGATION

[*4]12. PSEA treats as chargeable to fair-share feepayers represented by SAEA and the Grove City Area Education Association ("GCAEA") the expenditures it incurs for litigation that arises out of the duties of PSEA or its affiliates as exclusive representatives of the bargaining units they represent, whether or not the particular piece of litigation relates specifically to the SAEA and GCAEA bargaining units. This includes, for example, litigation growing out of collective bargaining (including work stoppages), the enforcement or protection of the rights of bargaining unit members under a collective bargaining agreement, unfair labor practice charges, and duty of fair representation claims. It also includes litigation that PSEA or its affiliates prosecute or defend in the interest of maintaining themselves as viable organizations, such as tort and contract litigation, internal labor relations matters, and the like.

13. Litigation papers setting forth the nature of several cases, funded during 1993-94, that provide examples of chargeable litigation related to collective bargaining and contract administration are attached [to the Stipulation].

14. Examples of "organizational maintenance" litigation, a percentage of which PSEA charges to nonmembers as part of its administrative overhead, would include cases such as (a) a tort action brought by a business invitee injured during an accident at the offices of PSEA or an affiliate; (b) litigation arising out of work performed by a contractor engaged in a construction project for PSEA or

an affiliate; and (c) litigation arising out of the employment relationship between PSEA (or an affiliate) and its employees.

C. FACTS RELATING TO EXPENDITURES FOR HEALTH-CARE PROFESSIONALS

15. PSEA's affiliated local associations represent the following types of employees: (a) teachers and other education professionals (103,712 employees in 608 bargaining units during the 1994-95 school year); (b) educational support personnel (21,391 employees in 371 bargaining units during 1994-95); and (c) health-care professionals, in both the public and private sectors (approximately 1,548 employees in 6 bargaining units during 1994-95).

16. PSEA provides generally the same kinds of services to all of its affiliated local associations, and to the members of their bargaining units, regardless of which type of employee the local association represents.

17. In calculating its dues percentage that is chargeable to fair-share feepayers, PSEA considers all of its expenditures together, calculating the ratio of all of its chargeable expenditures to all of its expenditures–rather than treating separately, and calculating separate chargeable percentages for, its expenditures attributable to services provided to educational professionals, educational support personnel, and health-care professionals.

D. GENERAL FACTS

18. As part of its calculation of its fair-share fee, PSEA divides its program expenditures into 20 categories of activities, which are treated as either chargeable or nonchargeable. To assist its staff in categorizing their activities, PSEA developed, for each of its divisions, a list of activities typically performed by the division in each of the 20 categories.

[*5]Doc. 102. The Stipulation of Facts filed is accompanied by a list of the categories and normally associated activities, and by PSEA's Operating Budget and Fiscal Policy for 1994-1995.

The plaintiffs assert that the defendants have not complied with the constitutional requirements for the collection of agency fees, as that duty is defined under *Teachers Local No. 1 v. Hudson,* 475 U.S. 292, 301 (1986). They assert that defendants have included expenses in the fair share fees charged to nonmembers that are constitutionally proscribed, under *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 528 (1991).

The plaintiffs assert that they are entitled to judgment as a matter of law on their claim for a declaration that the defendant SAEA, the local association, is required to have its financial disclosure to nonmember "fair share" feepayers verified by an independent auditor. The plaintiffs rely upon *Hudson,* 475 U.S. at 307, n. 18, and *Hohe v. Casey,* 727 F.Supp. 163, 166- 67 & n. 3 (M.D.Pa.1989), final judgment, 136 L.R.R.M. (BNA) 2198 (M.D.Pa.1990), *aff'd in part, rev'd in part,* 956 F.2d 399 (3d Cir.1992); *accord, id.* 740 F.Supp. 1092, 1096 (M.D.Pa.1989). In *Hudson,* the Court said that adequate

disclosure to the fair share feepayer surely includes verification by an independent auditor.

The argument of the defendants that an audit of the financial disclosures of the local association is not required is that a small union like SAEA is not required to provide audited financial statements as a precondition for collecting a fair share fee. Citing *Hudson* and *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209 (1977), the defendants note that the objective of the financial disclosure must be to devise a way of preventing compulsory subsidization of ideological activities and programs by employees who object to them ". . . without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." The defendants make the argument that an "absolutist" application of the requirement for an independent audit in the case of a small local union fails to appropriately allocate or maintain the mandated balance as between the First Amendment interests of the nonmember and the Union's financial needs. The defendants assert that the requirement of an audit would make the collection of any fee prohibitively expensive.

As the defendants acknowledge, an audit provides the highest level of assurance to financial statement users. The assertion of prohibitive expense to an audit is not supported by the stipulated facts.[1] The *Hudson* and *Hohe* decisions require the conclusion that the requirement for verification by an independent auditor is a constitutional requirement despite the financial

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[1] In addition, we are not presented with the basis for the tacit assumption that the auditing costs are not assignable at least in part for purposes of the fair share calculation to the collective bargaining expenses column in the ledger. But we believe that the cost of auditing is immaterial, since it is clearly required as a matter of law.

implications. The purpose of the audit is not to place on the Union the duty to prove its entitlement to the fee that it seeks. The purpose is to permit the feepayer to make an informed decision about whether to challenge the fee. The defendants' concept of a constitutionally compelled requirement that is at the same time a varying requirement, varying as a function of the size of the Union, is not supported by legal authorities or reasonable inferences from authorities. The plaintiffs are entitled to a judgment in their favor on the stipulated facts with respect to the issue whether the defendant SAEA must provide an audited financial statement. The Court should declare that the defendant SAEA must provide to a nonmember a financial statement that has been audited.

[*6]The second contention of the plaintiffs in their motion for summary judgment is that nonmembers may not be charged, as the plaintiffs allegedly have been charged by defendants PSEA and NEA, for litigation expenditures incurred in litigation not relating specifically to the plaintiffs' own collective bargaining unit. The plaintiffs rely upon the principal opinion of the Court in *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507, 528 (1991). Justice Blackmun stated it to be the holding of the Court, in this opinion, that extra-unit litigation may not be charged through to a nonmember. Justice Blackmun wrote that extra-unit litigation is "more akin to lobbying in both kind and effect" and that "such activities are not germane to the union's duties as exclusive bargaining representative."

Under *Lehnert,* a state or national union may charge all feepayers for all otherwise chargeable items of the resources that the union makes available to all of its affiliates, regardless of which affiliates use those resources in a given year. The defendants see no reason for treating litigation expenses differently

from other expenses. They criticize the view stated by Justice Blackmun on the basis that it fails to recognize the various types of litigation that the unions typically engage in. They argue that the stated holding of Justice Blackmun is not actually the holding of the Court.

The types of litigation mentioned in the stipulated facts as examples, *supra at page 8, § B.12,* may or may not . . . be more akin to lobbying in kind and effect than activities that are germane to the union's duties as exclusive bargaining representative. Whether this is so or not, it is true that they do constitute extra-unit litigation.

The context of the *Lehnert* decision is to be noted. In *Ellis v. Railway Clerks,* 466 U.S. 435, 453 (1984), the Court had held that an objecting employee may not be required to share in the expense of litigation unless his or her own bargaining unit is directly concerned. Justice Blackmun in *Lehnert* stated it to be the holding of the Court and the rule of law that the holding in *Ellis* applies in the case of public union members. 500 U.S. at 528. Justice Scalia, concurring in part, reached the same result by application of a different rationale. ("I would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent." 500 U.S. at 550. The United States Court of Appeals for the Sixth Circuit had held that extra-unit litigation expenses could be charged to all feepayers. *Lehnert v. Ferris Faculty Ass'n,* 881 F.2d 1388 (6th Cir.1989). The Supreme Court in *Lehnert* affirmed in part, reversed in part and remanded for further proceedings consistent with the opinion. 500 U.S. at 532. The parties jointly acknowledge the supremacy and dispositive character of the question whether the Court in *Lehnert* held that extra-unit litigation costs may not be charged of objecting feepayers. We

think it to have been the holding of the Court as to the chargeability of extra-unit litigation costs that such costs may not be charged of objecting feepayers. The arguments of the defendants that it is not rational to distinguish litigation expenses on a general and preclusive scale from other kinds of collective bargaining activities for this purpose do not get reached when the issue has been determined by the United States Supreme Court.

[*7]This Court should accordingly declare extra-unit litigation expenses to be precluded from those permissibly chargeable to objecting feepayers and should enjoin the collection from the nonmember plaintiffs of such costs.

The other question is whether expenditures for bargaining units other than those composed of public school employees are chargeable. The stipulated facts are that PSEA does not separately treat, and calculate separately chargeable expenses for, educational professionals (the category into which the plaintiffs here would be placed), expenses for educational support personnel and expenses for health-care professionals. The plaintiffs characterize these other bargaining units as "disparate and unrelated". Invoking *Lehnert,* they assert a right not to be charged for activities relating to the other categories of union members.

The question involving the chargeability of expenditures for bargaining units other than those composed of public school employees is not an issue involving a direct application of a binding precedent such as the litigation expenses issue, where the question involved was whether *Lehnert* is a Supreme Court precedent controlling the disposition of the particular question presented. Here, the question is the highly factual question of

relatedness as between bargaining activities and the various employee categories. The plaintiffs find support for their position on this issue in the fact that "there is no showing or mention in the record that negotiations in the private or public hospital health-care professional bargaining unit directly affected the results of bargaining in the public school bargaining units, much less Plaintiffs' specific public school bargaining units." Doc. 107, page 16. All that this proposition might support in our view is that there may exist a material question of fact in dispute that precludes summary judgment on this issue. But the parties here have stipulated to the facts, and have indicated their shared belief that this dispute should be decided on the basis of the stipulated facts.

The burden of proof in a civil action to establish an evidentiary basis to recover is on the plaintiffs, who must establish their right to recover by a preponderance of the evidence. Burdens of proof are relevant to a summary judgment motion brought after discovery is completed by a party without the burden or the theory that the party with the burden lacks adequate evidence to carry the burden. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

The defendants' position on this issue is the factual-in nature assertion that the availability of the state union's and national union's services provides a benefit to the local bargaining unit and that therefore the expenditures fulfill the *Lehnert* decision's relatedness requirement.

An audited financial statement of expenditures that shows to a feepayer the amounts expended on behalf of each of the several classifications of represented feepayers would provide the nonmember feepayer a basis to know whether there are expenses

being incurred that he or she would choose to challenge on the basis that the expenses do not relate to that feepayer's collective bargaining interests. It would be the best approach to this concern for the state and national associations to indicate by proration those areas of expenses that the association believes to be of general benefit and to charge through to the correct classification(s) of feepayers those expenses that really serve the interests of only the charged classifications. No such delineation of expenses is presented here.

[*8]Here, in this litigation, the stipulation is that: 16. PSEA provides generally the same kinds of services to all of its affiliated local associations, and to the members of their bargaining units, regardless of which type of employee the local association represents. The plaintiffs can not be deemed to have provided a basis for declaratory or injunctive relief on the basis of this stipulation. Given this factual basis, the correct resolution of the third of these three questions presented for resolution is to grant summary judgment on the question in favor of the defendants.

For the foregoing reasons, it is recommended that plaintiffs' motion for summary judgment be granted in part and denied in part. It is recommended that defendants' motion for summary judgment be granted in part and denied in part. It is recommended that declaratory and injunctive relief be granted in favor of the plaintiff upon their claims relating to the local audit issue and relating to extra-unit litigation. As to the plaintiffs' claim relating to expenditures for health-care professionals, it is recommended that plaintiffs' prayers for declaratory and injunctive relief be denied.

* * * *

APPENDIX D

SUR PETITION
FOR PANEL REHEARING WITH SUGGESTION FOR
REHEARING *EN BANC* OF THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MAY 8, 2003.

[328 F.3d 715]

Marsha OTTO; F. Naylor Emory; Dennis A. Erb; Robert K. Gilbert; James W. Lossell; Barbara J. McAlley; Wesley S. Semple, On behalf of themselves and all other non-members similarly situated

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA; National Education Association; Shaler Area Education Association, On behalf of themselves and all other local associations similarly situated, Appellants.

Marsha Otto; F. Naylor Emory; Dennis A. Erb; Robert K. Gilbert; James W. Lossell; Barbara J. McAlley; Wesley S. Semple, On behalf of themselves and all other non-members similarly situated, Appellants

v.

Pennsylvania State Education Association-NEA; Shaler Area Education Association, On behalf of themselves and all other local associations similarly situated; National Education Association; Grove City Area Education Association; Jane Campbell; Barbara Leiby.

Nos. 01-3858, 01-4110.

United States Court of Appeals, Third Circuit

May 8, 2003.

* * * *

Present: BECKER, Chief Judge,* SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH and STAPLETON,** Circuit Judges and O'NEILL,*** District Judge.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges of the Circuit in regular active service, and a majority of the circuit judges of the Circuit in regular active service not having voted for rehearing by the Court ***en banc,*** the petition for rehearing is DENIED. Chief Judge Becker* and Judge Nygaard would have granted rehearing ***en banc.***

The judges who participated in the decision of the Court having voted for rehearing, the petition for panel rehearing is granted and the opinion and judgment en-[716]tered April 3, 2003 are vacated. An amended opinion is issued as of this date.

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* Judge Becker was Chief Judge at the time for voting on the petition for rehearing.

** Senior Judge Walter K. Stapleton, who sat on the original panel, is limited to panel rehearing only.

*** Judge Thomas O'Neill, Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation, is limited to panel rehearing only.

APPENDIX E

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

UNITED STATES CONSTITUTION
First Amendment

Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX F

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

UNITED STATES CONSTITUTION
Fourteenth Amendment

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

APPENDIX H

PENNSYLVANIA FAIR SHARE ACT, 71 P.S. §§ 575 (a); (b); (c)

1990

PENNSYLVANIA FAIR SHARE ACT

§ 575. (Adm. Code § 2215). Fair share fee; payroll deduction

(a) As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

* * * *

"**Fair share fee**" shall mean the regular membership dues required of members of the exclusive representative less the cost for the previous fiscal year of its activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employe organization as exclusive representative.

* * * *

(b) If the provisions of a collective bargaining agreement so provide, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a fair share fee.

(c) To implement fair share agreements in accordance with subsection (b), the exclusive representative shall provide the public employer with the name of each nonmember who is obligated to pay a fair share fee, the amount of the fee that he or she is obligated to pay and a reasonable schedule for deducting said amount from the salary or wages of such nonmember. The public employer shall deduct the fee in accordance with said schedule and promptly transmit the amount deducted to the exclusive representative.

* * * *

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No. 03-188

IN THE

Supreme Court of the United States

MARSHA OTTO, F. NAYLOR EMORY, DENNIS A. ERB, ROBERT K. GILBERT, JAMES W. LOSSELL, BARBARA J. MCALLEY, and WESLEY S. SEMPLE,
Petitioners,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, NATIONAL EDUCATION ASSOCIATION, and SHALER AREA EDUCATION ASSOCIATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF IN OPPOSITION

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September 2003

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QUESTIONS PRESENTED

1. Whether the rule established by this Court in *Lehnert v. Ferris Faculty Association* that permits a state or national union to calculate its fair-share fee by pooling the expenditures it makes on behalf of the various bargaining units represented by its affiliated local unions contains an exception with respect to expenditures for litigation.

2. Whether the First Amendment requires a union that represents employees in several different professions to determine its fair-share fee by calculating the chargeable percentage of its expenditures separately for each such occupational group.

CORPORATE DISCLOSURE STATEMENT

Respondents Pennsylvania State Education Association and National Education Association are organized as nonprofit corporations. Neither has any parent corporation, nor does any publicly held company own any stock in either respondent.

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IN THE

Supreme Court of the United States

No. 03-188

MARSHA OTTO, F. NAYLOR EMORY, DENNIS A. ERB, ROBERT K. GILBERT, JAMES W. LOSSELL, BARBARA J. MCALLEY, and WESLEY S. SEMPLE,
Petitioners,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, NATIONAL EDUCATION ASSOCIATION, and SHALER AREA EDUCATION ASSOCIATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF IN OPPOSITION

Respondents Pennsylvania State Education Association, National Education Association, and Shaler Area Education Association respectfully urge the Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Petitioners are education employees in bargaining units represented by respondent Shaler Area Education Association ("SAEA") and by nonparty Grove City Area

Education Association ("GCAEA"),[1] who have chosen not to become dues-paying members of their unions. Petitioners are therefore required under the terms of Pennsylvania law and the applicable collective bargaining agreements to pay to SAEA or GCAEA, and their state and national parent unions—respondents Pennsylvania State Education Association ("PSEA") and National Education Association ("NEA")—a "fair share" fee that goes toward defraying the unions' costs of providing collective-bargaining services that benefit union members and nonmembers alike.

This Court has upheld against First Amendment challenges state statutes that permit public-sector unions to collect a fair-share fee (or "agency fee"), and at the same time has held that the First Amendment does prohibit unions from charging feepayers, over their objection, for the portion of union dues that goes for activities not germane to the union's collective bargaining function. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), the Court (i) set out the general standard for determining which union expenditures are chargeable to objecting feepayers, *id.* at 519;[2] and (ii) unanimously determined that as a general matter state and national parent unions may constitutionally calculate their fair-share fees on the basis of their pooled expenditures incurred on behalf of all of the bargaining units represented by their affiliated local unions, rather than only their expenditures incurred on behalf of each objecting feepayer's own bargaining unit. *Id.* at 522-24; *see*

---

[1] GCAEA was dismissed as a party early in the proceedings.

[2] "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." In this brief, we refer in shorthand to expenditures meeting this test as "germane to collective bargaining."

also id. at 561-62 (Scalia, J., concurring on this point). It is this latter holding that is central to the issues presented here.

Notwithstanding *Lehnert*, plaintiffs brought this lawsuit alleging, in pertinent part, that PSEA and NEA had unconstitutionally based their fair-share fees on expenditures not constitutionally chargeable to objecting feepayers, including specifically (i) expenditures incurred by PSEA and NEA for germane-to-collective-bargaining litigation on behalf of bargaining units other than plaintiffs' units, and (ii) expenditures incurred by PSEA on behalf of affiliated bargaining units in the health-care—rather than the education—sector. We refer hereinafter to these two claims as the "litigation" issue and the "health-care employees" issue.

B. Like other unions, respondents fix their fair-share fees by determining which of their activities are chargeable and which are nonchargeable to objecting feepayers, and calculating the percentage of their prior-year expenditures that went for the former. That percentage, applied to the union's regular membership dues, yields the fair-share fee constitutionally chargeable to objectors.[3]

(1). In determining which of their expenditures are chargeable, PSEA and NEA apply the same standard to their expenditures for litigation as for all of their other expenditures: they treat as chargeable all litigation expenditures that are germane to collective bargaining and meet the general standard for chargeability set forth in *Lehnert*, and they treat as nonchargeable all litigation that is not germane to collective bargaining and does not meet that standard:

- Chargeable litigation includes, for example, expenditures for litigation to compel an employer to arbitrate grievances as required by a collective bargaining

[3] By statute, Pennsylvania limits the fair-share fee chargeable to *all* public-sector feepayers in a way that is roughly equivalent to the constitutional limitation for objectors. *See* 71 Pa. Stat. Ann. § 575(a).

agreement, to enforce an arbitrator's award under the collective bargaining agreement, or to defend against an employer's attempt to vacate an arbitration award, as well as litigation to compel an employer to comply with its legal obligation to negotiate in good faith for a collective bargaining agreement. The parties have stipulated that it is litigation of this kind that is at issue here.

- Nonchargeable litigation includes, for example, a legal challenge to a private-school voucher program or school-finance litigation.

In calculating the percentage of their total expenditures that is chargeable to objecting nonmembers, PSEA and NEA do not allocate their expenditures—whether expenditures for litigation or for anything else—among the hundreds (PSEA) or thousands (NEA) of bargaining units represented by their affiliated local unions. Rather, PSEA and NEA calculate the chargeable percentage of their expenditures, including litigation expenditures, on the basis of their pooled expenditures incurred for all bargaining units, in the manner generally approved by this Court in *Lehnert*.

(2) PSEA's affiliated local unions represent employees in three occupational groups: (a) teachers and other education professionals (103,712 employees in 608 bargaining units); (b) education support personnel (21,391 employees in 371 bargaining units); and (c) health-care professionals (1,548 employees in 6 bargaining units). PSEA provides generally the same kinds of services to all of its affiliated locals and to the members of their bargaining units, regardless of which type of employee the local union represents.

In calculating the percentage of its total expenditures that is chargeable to objecting nonmembers, PSEA does not allocate its expenditures among these three occupational groups and calculate separate chargeable percentages for each. Rather, PSEA calculates a single chargeable percentage based on all

of its pooled expenditures made on behalf of all of its affiliated bargaining units of education professionals, education support personnel, and health-care professionals.

C. Following the district court's denial of plaintiffs' motions to certify plaintiff and defendant classes, the parties reached a partial settlement that resolved all issues except plaintiffs' claims for declaratory and injunctive relief with respect to three discrete legal issues, including the two presented here. The parties also agreed to a stipulation of facts, on the basis of which these issues were presented to the court on cross-motions for summary judgment.

Adopting the recommendations of a magistrate judge, the district court granted summary judgment in favor of plaintiffs on the litigation issue and in favor of defendants on the health-care employees issue. Pet. App. 41a-48a. The Third Circuit reversed the district court's judgment on the former issue, Pet. App. 17a-25a, and affirmed on the latter, Pet. App. 25a-27a.

With respect to the litigation issue, the Third Circuit concluded that this Court's multiple opinions in *Lehnert* did not resolve this specific issue, and that in the absence of such authoritative guidance it should proceed by applying *Lehnert*'s general principles to the question presented. Taking that approach, the court below concluded that there was "no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses." Pet. App. 25a.

On the health-care employees issue, the Third Circuit stated the question before it as whether, "as a matter of law, . . . PSEA may pool costs across occupational groups." Pet. App. 26a. The court of appeals answered that question in the affirmative, explaining "that the *Lehnert* Court did not limit its holding [with respect to the permissibility of pooled expenditures] only to bargaining units within the same

industry, or within related industries." Pet. App. 27a. Rather, said the court, *Lehnert*

> stated a broad principle: "that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year."

Id. (quoting *Lehnert*, 500 U.S. at 523).

ARGUMENT

Petitioners seek review of the Third Circuit's holdings that (a) PSEA and NEA, as parent unions of their affiliated locals, could constitutionally calculate their fair-share fees by pooling their litigation expenditures incurred on behalf of various bargaining units, on the same basis as other types of union expenditures; and (b) PSEA could constitutionally calculate its fair-share fee by pooling its expenditures incurred on behalf of its affiliated bargaining units of education employees and health-care employees.

Both of the Third Circuit's holdings are entirely correct and neither calls for this Court's review:

- In a well reasoned analysis that is solidly based on this Court's teachings in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and its predecessors, the Third Circuit reached its ruling on the litigation issue through a sound application of *Lehnert*'s general principles. The court of appeals' decision is consistent with the emerging post-*Lehnert* consensus on this issue. *See Reese v. City of Columbus*, 71 F.3d 619, 623-24 (6th Cir. 1995); *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012, 1016 (7th Cir. 1998), *enforcing California Saw & Knife Works*, 320 N.L.R.B. 224, 237-39 (1995). While there was a scattering of early decisions to the contrary, none was fully reasoned, and none has proved to have any current purchase. Given the evolution of the law in

the lower courts, there is no live conflict that warrants this Court's attention.

- The Third Circuit's ruling on the health-care employees issue follows directly from *Lehnert*. The Petition's argument to the contrary is insubstantial and has no basis in *Lehnert* itself or in any lower court decision.

I.

The Third Circuit correctly resolved the litigation issue on the basis of *Lehnert*'s basic principles, and there is no need for this Court to review its decision.

A. In *Lehnert*, this Court upheld, as a general matter, the calculation by parent unions of their fair-share fees on the basis of pooled expenditures for all their local unions' affiliated bargaining units, because

> that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

500 U.S. at 523. That rationale supports treating as chargeable pooled litigation expenditures that are germane to collective bargaining, just as other pooled union expenditures that are germane to collective bargaining are treated as chargeable.

The stipulated facts of this case make it clear that the kind of litigation at issue here is part and parcel of unions' collective-bargaining and grievance-administration activities, and that this litigation is thus by definition chargeable to feepayers under *Lehnert*'s three-pronged test.

This litigation, the parties have stipulated, includes litigation to compel an employer to arbitrate grievances as required by a collective bargaining agreement, to enforce an

arbitrator's award under a collective bargaining agreement, or to defend against an employer's attempt to vacate an arbitration award; and litigation to compel an employer to comply with its legal obligation to negotiate in good faith for a collective bargaining agreement. Dkt. #102, ¶¶ 12-13; Dkt. #103, Exh. H-O. Indeed, the parties' stipulation frames the issue here as whether litigation costs unrelated to the individual nonmember's bargaining unit must be excluded from the union's fee calculation "even when reasonably employed to implement or effectuate the duties of the exclusive representative." Dkt. #100.[4]

Requiring an objecting feepayer to pay her share of the expense of such litigation has no greater impact on the feepayer's First Amendment rights than does requiring the objector to pay her share of the pooled cost of negotiating the underlying collective bargaining agreement, or of administering the contractual grievance arbitration system—as *Lehnert* holds is constitutional. That being so, it makes no sense to count as chargeable on a pooled basis the expense of negotiating a contract and of prosecuting and arbitrating a grievance alleging violation of the contract, but not the cost of suing to enforce the arbitrator's award or defending a suit to vacate that award.

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[4] The unions also incur litigation expenditures, often not directly related to any specific bargaining unit, in the interest of maintaining themselves as viable organizations—for example, litigating a slip-and-fall tort suit brought by a visitor to the union's office, a contract dispute with a building contractor or landlord, or an employment-related lawsuit brought by an employee of the union. This Court has made clear that expenditures incurred for that purpose are part of a union's duties as exclusive representative: "Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence . . . ." *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 448 (1984). The unions treat such litigation as part of their administrative overhead, a percentage of which is charged to nonmember feepayers.

What is at stake in a case like this one, then, is *not* whether the litigation at issue is "chargeable"—as we have noted, under *Lehnert*'s three-pronged test it clearly is—but rather whether a parent union's chargeable expenditures for litigation must be treated differently than all of its other chargeable expenditures, and allocated to each bargaining unit on behalf of which such litigation expense is incurred rather than pooled across all affiliated bargaining units.[5]

Justice Kennedy's *Lehnert* opinion aptly put the question as whether litigation should be "remove[d] . . . from the scope of the Court's holding that a local bargaining unit may charge employees for their pro rata share of the costs associated with 'otherwise chargeable' expenses of affiliate unions." 500 U.S. at 563. Justice Kennedy's answer to that question was that, under the fundamental principle of pooled expenditures on which all members of the *Lehnert* Court agreed, there was "no principled basis" for drawing such a line between litigation and other union expenditures. *Id.*

In the instant case the Third Circuit reached precisely that conclusion: "[W]e discern no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses. Thus we conclude that they are chargeable to SAEA's non-members." Pet. App. 25a.

B. Petitioners argue that the Third Circuit's conclusion is contrary to *Lehnert* and to the Court's earlier decision in *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984).

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[5] As a *practical* matter, of course, it would hardly be feasible administratively for unions like PSEA and NEA—with many hundreds or thousands of affiliated bargaining units—to undertake a unit-by-unit allocation of their litigation expenditures and calculate separately their fair-share fees for nonmembers in each such unit. In consequence, any holding that litigation costs must be allocated on a unit-by-unit basis would have the practical result of rendering it impossible for PSEA and NEA to charge nonmembers for any litigation expenditures at all.

As the Third Circuit noted, the paragraph of Justice Blackmun's *Lehnert* opinion that advocated a special unit-by-unit exception for "the expenses of litigation that does not concern the dissenting employees' bargaining unit," 500 U.S. at 528, represented the views of a plurality of four Justices and thus did not express the opinion of the Court. Pet. App. 20a-22a. And, as we develop in the margin, Justice Blackmun's view is not supported by any persuasive reason for deviating from *Lehnert*'s general principle permitting pooling of parent union expenditures.[6]

And, as the Third Circuit also held, Pet. App. 17a-19a—and as Justice Kennedy made clear in his *Lehnert* opinion—

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[6] Justice Blackmun based his view on the proposition that "extraunit litigation [is] more akin to lobbying in both kind and effect," given "the important political and expressive nature of litigation." *Id.* at 528. With all respect, that view rests on a misperception of the nature of the germane-to-collective-bargaining litigation that is the only kind of litigation at issue in a case like this.

Under *Lehnert*'s three-pronged chargeability test, 500 U.S. at 519, any litigation of the kind referred to by Justice Blackmun—litigation that is "akin to lobbying" and "political" in nature—will not be chargeable *at all* to *any* feepayers. PSEA and NEA do indeed engage in such litigation—lawsuits challenging private-school voucher programs or a state's system of school financing, to cite a few examples—and in conformity with the *Lehnert* chargeability test they treat such litigation as *nonchargeable*, even to feepayers within the bargaining unit on whose behalf such litigation was undertaken. With respect to this kind of "political" litigation, the question whether it can be charged to feepayers outside the bargaining unit on behalf of which it is undertaken never arises, because such "political" litigation is not germane to collective bargaining and thus is not chargeable *at all*.

Rather, the issue of "extra-unit litigation" arises only with respect to litigation that is germane to collective bargaining. And such litigation is no more akin to legislative "lobbying" and no more "political" than negotiating a collective bargaining agreement or invoking the agreement's grievance procedures—both of which are chargeable on a pooled basis under *Lehnert*'s general principles.

the Court's earlier opinion in *Ellis* "contains no discussion of whether a local bargaining unit might choose to fund litigation which is 'a normal incident of the duties of the exclusive representative,' [466 U.S.] at 453, through a cost sharing arrangement under the auspices of the affiliate." *Lehnert*, 500 U.S. at 564 (opinion of Kennedy, J.). This case thus "presents a significantly different question than *Ellis*." Pet. App. 18a.

The Third Circuit was, in short, entirely correct in concluding that it was "left without definitive Supreme Court guidance" on this question, and that the issue should be resolved on the basis of *Lehnert*'s general principles. Pet. App. 22a.

C. The Third Circuit's decision is consistent with the only recent court of appeals decisions—of the Sixth Circuit and the Seventh Circuit—as well as with the recent decision of the National Labor Relations Board ("NLRB"). Those four well reasoned decisions are, admittedly, contrary to three more cursory decisions that issued in 1991 and 1992 on the heels of *Lehnert*—one from the Tenth Circuit and two from state courts. But the earlier cases do not create a live conflict in the lower courts that warrants this Court's attention. The recent decisions represent an emerging consensus that so fully overrides the 1992 tentative view as to give confidence that if this issue were presented anew to those courts they would realign themselves with the position taken by the more recent decisions.[7]

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[7] As do petitioners, we note here cases decided under the First Amendment, the Railway Labor Act, and the National Labor Relations Act. Were one to consider only the public-sector cases decided under the First Amendment, the federal courts of appeals would be unanimous in permitting pooled litigation expenses, while two state court opinions containing little analysis would constitute the only authority reaching the opposite result.

In *Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995), the Sixth Circuit approved the pooling of litigation expenditures that were "directly related to grievance handling, the enforcement of the collective bargaining agreement and negotiating collective bargaining agreements." *Id.* at 623. While noting that *Lehnert* "did not have a holding on this precise issue," *id.* at 623, the court held that pooling litigation expenditures was constitutional by extrapolating from *Lehnert*'s holding with regard to pooled collective-bargaining-related expenditures generally. *Id.* at 623-24.

The Seventh Circuit, in *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), reached the same conclusion. Enforcing an NLRB order that upheld expense pooling generally and pooling of litigation expenditures specifically, the Seventh Circuit held that litigation expenditures were "analytically identical" to other union expenditures related to collective bargaining. *Id.* at 1016.

The NRLB, in the decision enforced by the Seventh Circuit, held that unions were not required to "segregate litigation costs on a unit-by-unit basis, as long as the categories of litigation charged to objecting employees are related to the union's basic representational functions, and are not the type of political extra-unit litigation that concerned the Court in *Lehnert*." *California Saw & Knife Works*, 320 N.L.R.B. 224, 239 (1995), *enforced*, 133 F.3d 1012 (7th Cir. 1998). Addressing Justice Blackmun's *Lehnert* opinion directly, the Board explained that "[t]he kinds of extra-unit litigation that we contemplate as being properly chargeable to objectors under a union-security clause would not be the kinds of lawsuits that are 'akin to lobbying.'" *Id.* at 238. The Board added that it would

> apply the same standard for determining the chargeability of litigation expenses as we are required by

> *Beck*[8] to apply to all other expenses—whether they are germane to the union's role in collective bargaining, contract administration, and grievance adjustment—regardless of whether the activities were performed for the direct benefit of the objector's bargaining unit.

Id. at 239.

Of the three earlier cases that reach the opposite result, only the Tenth Circuit's decision in *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1129-31 (10th Cir. 1991), contains any substantive analysis, and that analysis starts from an erroneous premise. The Tenth Circuit approached the issue as if *Ellis* were both the first and last word on the pooling of litigation expenditures, giving only a glancing nod to *Lehnert*—and then only to the litigation paragraph of Justice Blackmun's plurality opinion. The court of appeals both failed to appreciate that "*Ellis* . . . contains no discussion of whether a local bargaining unit might choose to fund litigation which is 'a normal incident of the duties of the exclusive representative,' . . . through a cost sharing arrangement under the auspices of the affiliate," *Lehnert*, 500 U.S. at 564 (opinion of Kennedy, J.), and failed to confront *Lehnert*'s unanimously adopted teaching with respect to expense pooling generally, much less explain why that teaching did not apply.[9]

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[8] *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[9] For example, the court noted that Justice Scalia would have "required 'a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit," 938 F.2d at 1130 n.4 (quoting 500 U.S. at 562), and concluded from this "that a majority of the Supreme Court would not allow ALPA to charge these litigation expenses to the plaintiffs." *Id.* In drawing that conclusion, the Tenth Circuit entirely missed the central teaching of *Lehnert*, which Justice Scalia articulated just two sentences further on in his opinion: "*It is a tangible benefit*, however, to have expert consulting services on call, even in the years when they are not used." 500 U.S. at 562 (emphasis added).

Two state courts—acting in the year following *Lehnert*—reached the same conclusion. *See Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App.), *adopted*, 594 N.E.2d 781 (Ind. 1992); *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992). But in both cases, the courts proceeded on little more than the assertion, unsupported by further reasoning or explanation, that Justice Blackmun's plurality opinion in *Lehnert* was "persuasive."

Since 1992, no court has followed the lead of these early cases, while three circuits and the NLRB have issued thoughtful decisions rejecting the position they took. The recognition of the more recently decided cases that, as the Third Circuit put it, there simply is "no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses," Pet. App. 25a, demonstrates a consensus that reflects the mature state of the lower courts' jurisprudence on this issue, that eclipses the early tentative contrary view, and that demonstrates that petitioners' claim of a live conflict in the lower courts is hollow.

II.

The second issue decided by the Third Circuit and raised by the Petition is whether, as a matter of law, the First Amendment requires a union that represents employees in more than one occupation or industry to calculate separately its fair-share fee for employees in each such occupational group by disaggregating its pooled expenditures and assigning each expenditure to the occupational group on behalf of which it was incurred.

The health-care employees issue is not, as petitioners would have it, whether the education professionals represented by PSEA local unions can "be required to pay the costs of representing public-and private-sector nurses," Petition at i, in the sense of "subsidization of the costs of

representing" them, *id.* at 30. As the Third Circuit observed, Pet. App. 27a, it is just as likely that the fair-share fee charged to education professionals like petitioners is *lower* because of PSEA's calculation of a single chargeable percentage based on aggregated expenditures than it would be were PSEA to calculate separate chargeable percentages for education and health-care employees.

Nor is there any issue here of whether PSEA has properly counted any specific expenditure as chargeable, or whether PSEA has made an adequate showing of the chargeability of any particular expenditure. All claims with respect to the accuracy of PSEA's calculation of its chargeable percentage for any year in the past were settled in the district court. Dkt. #100. The *only* health-care employees issue raised in this case—and the only such issue decided by the Third Circuit—is whether, as a matter of law, PSEA must calculate separate chargeable percentages of its expenditures on behalf of education employees and on behalf of health-care employees.

The Third Circuit held that, under *Lehnert*, PSEA could pool its expenditures across occupational groups. Pet. App. 26a. That holding is compelled by *Lehnert* itself and is consistent with the only other court of appeals decision in point. And petitioners do not even claim—nor could they—that there exists any lower court decision holding the contrary.

The claim petitioners raise here is in essence the same claim that was raised and rejected in *Lehnert*. The *Lehnert* petitioners argued that unit-by-unit allocation of expenditures should be required precisely because of the trend toward unions that represent workers in multiple industries, often in both the public and private sectors—among them the defendant unions in that case:

> Many national unions serve employees in more than one industry or occupation and in both the public and private sectors. There is a "steady trend toward" a smaller num-

> ber of larger internationals serving employees in "diverse parts of the economy." ... Respondent Michigan ("MEA") and National ("NEA") Education Associations are such "conglomerates," with locals of not only faculty in higher education, but also teachers in public elementary through high schools, educators in private and parochial schools, school secretaries, and school nurses.

Reply Brief for the Petitioners at 7-8 in *Lehnert* (No. 89-1217) (available on Lexis at 1989 U.S. Briefs 1217). Notwithstanding that the defendant unions thus represented bargaining units of not only teachers but also nurses, and employees in both the public and private sectors, this Court rejected the contention that the First Amendment required allocation of parent union expenditures on a unit-by-unit basis. 500 U.S. at 522-24.

Not surprisingly then, the only other post-*Lehnert* appellate decision that addresses this question comes to precisely the same conclusion as did the Third Circuit here. *See Finerty v. NLRB*, 113 F.3d 1288 (D.C. Cir. 1997) (holding that it was not unlawful for the Communications Workers of America to use pooled nationwide expenditures as the basis for calculating fair-share fees, notwithstanding that those expenditures were made for the benefit of employees in the telecommunications and printing industries, as well as in state and local government, in both the public and private sectors, and in Canada as well as the United States).

Having no other argument as to why the First Amendment prohibits the pooling of union expenditures for multiple occupational groups, petitioners assert that the unions have failed to show that PSEA's expenditures for bargaining units of health-care employees "may ultimately inure to the benefit" of bargaining units of education employees. Petition at 26 (quoting *Lehnert*, 500 U.S. at 524). That argument is specious.

The question here, as noted above, is purely one of law. It is stipulated that "PSEA provides generally the same kinds of services to all of its affiliated local associations, and to the members of their bargaining units, regardless of which type of employee the local association represents." Dkt. #102, ¶ 16. That brings PSEA's expenditures for health-care bargaining units within the ambit of *Lehnert*'s holding that "that part of the local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." 500 U.S. at 523. The affiliation fees that petitioners' local unions pay to PSEA—part of which go for services provided to bargaining units of health-care employees—"inure to the benefit" of the members of petitioners' bargaining units because these same services will be available to petitioners' bargaining units in another year when such services are needed.

Petitioners' request for review of this issue is wholly without substance.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MARSHA OTTO; F. NAYLOR EMORY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; AND WESLEY S. SEMPLE, ON BEHALF OF THEMSELVES AND ALL OTHER NON-MEMBERS SIMILARLY SITUATED,

Petitioners,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA; NATIONAL EDUCATION ASSOCIATION; AND SHALER AREA EDUCATION ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER LOCAL ASSOCIATIONS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. The Unions Admit That There Is a Conflict Among the Lower Courts on the First Two Questions Presented.

Respondent unions ("Unions") admit that there is a conflict among the Third Circuit, other United States Courts of Appeals, and highest state courts on the first two questions the Petition presents. However, the Unions bizarrely argue that a split among the courts does not count if there is no split among "the more recent decisions." Brief in Opposition ("Opp'n") at 11. Incredibly, the Unions claim that Supreme Court Rule 10(a) is nullified because the cases supporting them and the Third Circuit were decided a few years after the conflicting cases! Does a widespread split of opinion among the lower courts disappear if the more recent cases happen to agree? Of course not, and nothing in this Court's rules or case law supports such an illogical assertion.

The Unions maintain that the more recent decisions are "well reasoned," while the contrary earlier decisions are "cursory" and "tentative." Opp'n at 11. In fact, the opposite is true.

The "analysis" in *Reese v. City of Columbus*, 71 F.3d 619, 623-24 (6th Cir. 1995), is only two paragraphs. It erroneously found that a majority of this Court approved the chargeability of pooled litigation expenses in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). It also totally ignored this Court's holding in *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984), that extra-unit litigation expenses "are not to be charged to objecting employees." *See* Petition ("Pet.") at 10 n.7, 15, 22 n.23.

The Seventh Circuit provided no analysis at all in *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998). Instead, it cryptically said that litigation expenditures are "analytically identical, as far as we can see," to all other extra-unit expenditures. Then, while totally ignoring *Ellis*, it merely deferred to the National

Labor Relations Board ("NLRB"). *Id.* at 1016. The NLRB's decision only had two paragraphs of "analysis." More important, the NLRB recognized that this Court in *Ellis* and *Lehnert*, 500 U.S. at 528, held all extra-unit litigation **not** chargeable. The NLRB, however, declined to follow those rulings because it felt they were not binding under the NLRA. *California Saw & Knife Works*, 320 N.L.R.B. 224, 238 (1995), *enforced sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998); *see* Pet. at 14-15 & n.15. Both the Third and Seventh Circuits, Pet. App. A at 23a, *Machinists*, 133 F.3d at 1016, inexplicably omitted from their "analysis" the NLRB's recognition of this Court's extra-unit litigation holdings.

In contrast, the slightly earlier, conflicting decisions fully analyzed and discussed both *Ellis* and *Lehnert*. The Tenth Circuit's analysis of this issue in *Pilots Against Illegal Dues (PAID) v. Air Line Pilots Ass'n* consists of more than two pages. 938 F.2d 1123,1129-31 (10th Cir. 1991). Far from being "a glanc-ing nod," Opp'n at 13, *PAID*'s discussion of *Lehnert*'s extra-unit litigation ruling consists of more than half a page and a footnote. 938 F.2d at 1130 & n.4. Moreover, the Tenth Circuit analyzed more than just "Justice Blackmun's plurality opinion," Opp'n at 13. It discussed *Lehnert*'s general three-prong chargeability test, *Lehnert*, 500 U.S. at 519, and confronted *Lehnert*'s teaching regarding expense pooling, *id.* at 524, in holding extra-unit litigation nonchargeable. *See PAID*, 938 F.2d at 1128-30; Pet. at 10 & n.8, 12 & n.11.

The Unions belittle the two state court decisions which reached the same conclusion as "proceeding on little more than the assertion, unsupported by further reasoning or explanation, that Justice Blackmun's plurality opinion in *Lehnert* was 'persuasive.'" Opp'n at 14. The two courts, however, relied on more than Justice Blackmun's words to find his opinion persuasive.

Albro v. Indianapolis Education Ass'n analyzed this issue for three paragraphs and based its holding on Justice Scalia's concurring and dissenting opinion and the Court's judgment in *Lehnert*. 585 N.E.2d 666, 673 (Ind. Ct. App.), *adopted sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992). The Wisconsin Supreme Court spent three paragraphs on the issue, applied the general chargeability test, and discussed the Blackmun and Scalia opinions: "[I]t may be inferred from Justice Scalia's discussion of *Ellis* and from other early cases that a majority of the Court would find extra-unit litigation expenses non-chargeable." *Browne v. Wisconsin Emp. Rel. Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992). *See* Pet. at 15, 20 n.21.

There is nothing "tentative" about these three well-reasoned decisions that are faithful to this Court. The Unions' claim that the more recent decisions "represent an emerging consensus that * * * fully overrides the [earlier] tentative view," Opp'n at 11, is merely their biased view that analysis in cases they favor is more substantive than analysis in cases they dislike. The fact remains that a significant split exists on this issue among the courts. More than seven different courts have discussed and tried to resolve this issue for almost twelve years and have split almost evenly. *See* Pet. at 11-16, 22 & n.23. Further "percolation" will provide no further assistance to this Court. It should exercise its supervisory power to now resolve this conflict.

II. *Lehnert* Established Exceptions to Its General Ruling on Pooled Affiliate Expenditures.

The Unions also argue against granting the Petition because the "Third Circuit correctly resolved the litigation issue on the basis of *Lehnert*'s basic principles" and its general ruling on "pooled expenditures." Opp'n at 7. However, the three questions presented by the Petition involve the two exceptions to *Lehnert*'s general rule that otherwise chargeable expenses of

parent affiliates incurred in other bargaining units may be pooled or charged to objecting nonmembers. *See* Pet. at i, 8-9. The Unions ignore this and the fact that in *Lehnert* Justice Blackmun's plurality opinion specifically rejected their contention that the pooled expenditures "rationale supports treating as chargeable pooled litigation expenditures that are germane to collective bargaining, just as other pooled union expenditures that are germane * * * are treated as chargeable," Opp'n at 7.

Justice Blackmun clearly stated in *Lehnert*:

> This rationale [that unions may bill dissenting employees for their share of general collective-bargaining costs of the state or national parent union] **does not extend**, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit * * * . While respondents are clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to another unit, we find extraunit litigation to be more akin to lobbying in both kind and effect. We have long recognized the important political and expressive nature of litigation. Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative.

500 U.S. at 527-28 (emphasis added; citations omitted).

III. Extra-Unit Litigation Has a Greater Impact on First Amendment Rights Than Extra-Unit Bargaining Does.

Contrary to the Unions, Opp'n at 10 n.6, and the Third Circuit, even extra-unit litigation "germane to collective bargaining" does not pass *Lehnert*'s three-prong chargeability test. As

just discussed, Justice Blackmun found that this type of extra-unit litigation did not meet the first prong–"'germane' to collective-bargaining activity," 500 U.S. at 519. *Id.* at 527-28. Moreover, neither can extra-unit litigation pass the third prong–that it "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop," *id.* at 519. Extra-unit litigation, like organizing, *see Ellis*, 466 U.S. at 452-53, may not be charged to objectors because both are similar to political activities that have too attenuated a connection to bargaining, and both further burden free speech beyond the burden imposed by the agency shop itself.

The Unions and the Third Circuit are wrong that requiring an objecting feepayer to subsidize extra-unit litigation "has no greater impact on the feepayer's First Amendment rights" than requiring her to pay her share of pooled costs of extra-unit negotiations, Opp'n at 8. The Unions ignore Justice Blackmun's cogent point that "extraunit litigation [is] more akin to lobbying in both kind and effect," because of "the important political **and expressive** nature of litigation." *Lehnert*, 500 U.S. at 528 (emphasis added).

All litigation is not necessarily political. However, it is all public in nature, involves more than just the employer and union, and is "expressive" in a First Amendment sense, because litigation "is a means of petitioning the government that the first amendment protects." Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. Rev. 872 (1988). Thus, even litigation that involves only economic matters, such as labor contracts, is like lobbying in its relationship to the First Amendment. Where "groups with common interests * * * use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view **respecting resolution of their**

business and economic interests," their "right of access to the agencies and courts * * * is part of the right of petition protected by the First Amendment." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 513 (1972) (emphasis added); *see United Transp. Union v. State Bar*, 401 U.S. 576, 585 (1971). That cannot be said of collective bargaining itself, because there is no First Amendment right to bargain collectively. *See Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979) (per curiam).

While coerced support of other extra-unit bargaining-related activities may not add substantially to the burden on First Amendment rights the agency shop imposes, coerced support of extra-unit litigation does: "compelled subsidization of union litigation directly infringes objectors' corresponding first amendment right to refrain from litigation. The need to tailor this infringement narrowly mandates that the range of litigation expenditures chargeable to objectors be limited to those directly involving bargaining unit employees." Malin, *supra*, at 872.

IV. The Extra-Unit Litigation in *Ellis* Included Bargaining Related Litigation.

The Unions and the Third Circuit also are wrong that this Court's *Ellis* opinion does not address whether a local bargaining agent can choose to fund litigation that is "a normal incident of the duties of the exclusive representative," *Ellis*, 466 U.S. at 453, through a cost sharing arrangement with an affiliate. Opp'n at 10-11.[1] The litigation at issue, **which was held**

[1] The Unions also rely on Justice Kennedy's separate opinion in *Lehnert*, 500 U.S. at 562-64. *See* Opp'n at 9-11, 13. Justice Kennedy apparently disagreed with Justice Blackmun's ruling that all extra-unit litigation is nonchargeable. That Justice Kennedy felt compelled to note his position on this issue, although he also joined in Justice

(continued...)

nonchargeable in *Ellis*, included litigation related to collective bargaining in other units.

The "litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings," which was held nonchargeable in *Ellis*, 466 U.S. at 453, was "intervention in an employer's bankruptcy proceedings [that] protected the union members' wages and **ensured continued compliance with the collective bargaining agreement** while the employer underwent reorganization." *Ellis v. Railway Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982) (emphasis added), *rev'd in pertinent part*, 466 U.S. 435 (1984). "[D]efending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964" undoubtedly is "a normal incident of the duties of the exclusive representative." Nevertheless, it, too, was held nonchargeable by *Ellis*, unless the non-members' "bargaining unit is directly concerned." 466 U.S. at 453. In *Lehnert*, Justice Blackmun recognized that *Ellis* so held by specifically mentioning "union litigation" involving "bankruptcy proceedings" and "employment discrimination," citing *Ellis*, when he ruled that the general principle permitting pooling of otherwise chargeable parent union expenditures does not apply to extra-unit litigation. 500 U.S. at 528.

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[1] (...continued)
Scalia's opinion, 500 U.S. at 550, strongly suggests that Justice Scalia agreed with Justice Blackmun on this issue. *See* Pet. at 17-21. Significantly, the Unions failed to respond to this point, except to note that Justice Scalia joined in *Lehnert*'s "teaching with respect to expense pooling generally," Opp'n at 13 & n.9. As the Teachers demonstrated, Pet. at 9-17, there is widespread confusion among the lower courts over Justice Scalia's–**and, thus the Court's**–position on the chargeability of extra-unit litigation. This alone is reason to grant certiorari on the first two questions presented by the Petition.

In short, the Unions' attempts to distinguish *Ellis*, Opp'n at 8-11, are unavailing, because *Ellis* unanimously held all extra-unit litigation nonchargeable. **Both** Justices Blackmun and Scalia recognized that the *Ellis* holding on extra-unit litigation has a constitutional basis. *Lehnert*, 500 U.S. at 528 (Blackmun, J.); *id.* at 555 (Scalia, J.). Consequently, that holding is controlling here and should have been followed by the Third Circuit.

The Unions' "practical" argument that they cannot "undertake a unit-by-unit allocation of their litigation expenditures," Opp'n at 9 n.5, is disingenuous. All of their litigation expenses are easily identifiable and allocable by the local union or employer involved in each case. *See* R. 103, Exs. H-O (Stipulation of Facts). Moreover, that the impact of an activity on First Amendment freedoms must be considered in determining chargeability implies a need for greater sensitivity than that shown by the Unions and the Third Circuit in deciding what is germane to collective bargaining. In "close situations, the accounting should favor the dissenter's right ***not*** to fund programs they find offensive." *Schneider v. Colegio de Abogados*, 917 F.2d 620, 637 (1st Cir. 1990).

V. Reply to Arguments in Opposition to Third Question Presented about Health-Care Representation Costs.

As in their response to the first two questions, the Unions ignore the applicable exception to *Lehnert*'s general rule in responding to the third question. Instead, they argue the general rule as though no exception exists. *See* Opp'n at 14-17.

However, in *Lehnert*, a clear majority of the Court held that the general rule "does not serve to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit," and that, "as always, the union bears the burden of proving" "some indication

that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." 500 U.S. at 524; *see id.* at 534 (Marshall, J., joining in Part III-B of the principal opinion). Thus, this exception cannot be ignored here.

The Unions, by quoting from the Reply Brief for the Petitioners in *Lehnert*, also attempt to suggest that the precise issue of whether objecting educational professionals can be charged for the cost of representing public- and private-sector health-care nurses presented here was raised and resolved in *Lehnert*. Opp'n at 15-16. The *Lehnert* Reply Brief presented the issue of whether the *Lehnert* higher education faculty petitioners had to pay for the NEA and state affiliate costs of representing K-12 teachers, school secretaries and **school** nurses. *Id.* at 16. The Court answered affirmatively, but in so doing added the exception and burden of proof requirement noted above.

The Teachers here do not challenge paying for their share of the pooled costs of representing school nurses, school secretaries and other education support personnel, *see* Pet. App. C at 59a (¶ 15), 64a. Those employees, like the teachers, are all in the same industry, covered by the same bargaining statutes, and employed by the same type of employer. That is not the case with nurses employed by private- and public-sector hospitals and other health-care employers **outside public education**. Only the costs of representing the latter employees are challenged here as being for "unrelated bargaining unit[s]," 500 U.S. at 524.

The Unions argue that the Third Circuit's decision is in accord with *Finerty v. NLRB*, 113 F.3d 1288 (D.C. Cir. 1997). Opp'n at 16. *Finerty* is easily distinguishable. First, the court there based its decision on the fact that the parent union, not the local union, as here, was "*the designated bargaining agent for all*

of the affected employees in its approximately 2,400 different bargaining units * * * ." *Id.* at 1291 (emphasis in original). Second, *Finerty* did not involve the First Amendment and, thus, review *de novo*, as here. Rather, *Finerty* merely involved the statutory duty of fair representation and the deference a court owes an administrative body. *Id.* Third, *Finerty* involved only whether the union's "method of allocation is * * * *per se* unlawful," not, as here, "challenges to *specific* representational expenses." *Id.* at 1292 (emphasis in original).

Finally, and most important, *Finerty* recognized that in a "subsequent challenge proceeding" the NLRB might find that "some of the pooled charges may be collected [lawfully] only from employees in certain designated bargaining units," because those expenses would not inure to the benefit of employees in another industry ("*e.g.*, money for strike funds that would be available to support employees in the private sector, but unavailable to employees in public-sector units where strikes are unlawful"). *Id.* That is precisely the issue here, and one on which the Unions failed to meet their burden of proof under *Lehnert*. *See* Pet. at 26.

CONCLUSION

The petition should be granted as to all questions presented.

Respectfully submitted,

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